In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-959

ISAAC NEWTON HULVER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Isaac Newton Hulver, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 14, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported as of this date. The judgment and opinion of the District Court is unreported. The District Court's Order Denying Defendant's Motion for Partial Summary Judgment is reported at 393 F.Supp. 749 (W.D.Mo. 1974).

JURISDICTION

The judgment of the Court of Appeals which reversed the judgment of the District Court was entered on September 14, 1977. Subsequently the Court of Appeals entered an Order denying Plaintiff's Petition for Rehearing on October 12, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254. The jurisdiction of the District Court was based upon 28 U.S.C. §1346(b) and 28 U.S.C. §2671, et seq.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals fail to follow Rule 52(a) when, on the basis of two extracts from the record, it held the District Court's findings of fact were clearly erroneous without revealing the entire record and without giving deference to the District Court's assessment of credibility of witnesses' testimony?

2. Whether a medical malpractice claim accrues under the Federal Tort Claims Act prior to the time that the Plaintiff discovers or in the exercise of reasonable diligence should have discovered the acts constituting the alleged malpractice upon which his claim is based.

3. Whether the limitation period for medical malpractice claims under the Federal Tort Claims Act is tolled during the time that the Plaintiff is in the continuing treatment of the doctors or hospital, for the injuries which are the basis of his claim.

STATUTE AND RULES INVOLVED

This case involves the two-year limitation period for actions against the United States under 28 U.S.C. §2401(b) which provides in part:

> A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500, it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. . . .

This case also involves Rule 52(a) of the Federal Rules of Civil Procedure which provides in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

STATEMENT OF THE CASE

A. *Preliminary Statement*: This is a medical malpractice case under the Federal Tort Claims Act. The Plaintiff's lawsuit was based upon two separate claims of negligence in connection with his medical treatment—(1) negligent failure to obtain his informed consent to surgery which permanently impaired his sexual function; and (2) negligent surgery and treatment resulting in injury to his left lower extremity. The district court found for Plaintiff with respect to both claims of malpractice. The Court of Appeals did not disturb the findings of malpractice but reversed the District Court's judgment, holding that Plaintiff's claims were barred by the two-year limitation period.

This case presents important questions on the nature of appellate review of factual findings and questions on when a medical malpractice claim accrues under the Federal Tort Claims Act. The questions presented require resolution in the interest of orderly and uniform administration of significant legislation in the federal judicial system.

B. *Factual Background*: Isaac Newton Hulver is an Army veteran who served in World War II. He was born in Lexington, Missouri in 1912, and grew up in the area of Lexington, Mayview and Buffalo, Missouri. During his military service Mr. Hulver was severely wounded in the abdomen and right leg by machine gun bullets and shrapnel. He underwent a series of fifteen operations as a result of those wounds and was discharged from the Army in 1945 with a 100% disability rating which was later reduced to a 70% disability rating in 1946.

(App.B-p. A14)[1] From 1953 until 1971 Mr. Hulver worked in the monotype department of the Kansas City Star Company, Inc., a publisher of daily newspapers. In the course of his employment Mr. Hulver was required to lift heavy metal and galleys weighing up to seventy pounds. (App.B-p. A14)

In September, 1968, Mr. Hulver's personal physician referred him to the V. A. Hospital in Kansas City, Missouri, for diagnosis and treatment of numbness, paresthesia, and claudication in his right hip and leg. The problems caused Mr. Hulver to limp. The condition had existed to some degree for a number of years, but had worsened progressively over the three years immediately prior to 1968. Prior to October 1, 1968, Mr. Hulver had no sexual impairment and the disabling symptoms were confined to his right lower extremity. (App.B-p. A15)

(The Medical Treatment)

Mr. Hulver was admitted to the V. A. Hospital in Kansas City, Missouri, on October 12, 1968. In the course of his treatment there during the six months following that admission, Mr. Hulver underwent three operations to correct his condition and resulting complications.[2] (App. B-p. A16)

The first operation was performed on October 17, 1968, by Dr. Juan Carlos Nosti after Plaintiff's condition had

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1. References to "App.A-p. .....", "App.B-p. .....," "App. C-p. .....," and "App.D-p. ....." are to the appendices annexed to this petition. References to "Tr. p. ....." are to the pages of the trial transcript which was filed in the Court of Appeals.

2. The description of his medical treatment is recounted here only insofar as it relates to the question of when Mr. Hulver's claims of medical malpractice accrued. Details of the medical treatment, which related only to the malpractice involved, have not been included in this brief recitation.

been diagnosed as arteriosclerotic occlusive disease. Dr. Nosti performed an aortoiliac endarterectomy on the right side and left common iliac endarterectomy. (App.B-pp. A16-A17) An endarterectomy is a surgical procedure to remove arteriosclerotic plaque from the lining of an artery. During the October 17 operation, Dr. Nosti made one incision in Mr. Hulver's abdomen. He then made two separate arterial incisions or arteriotomies. The first incision was in the terminal aorta down into the right common iliac where it bifurcates into the left and right common iliac arteries. The second arteriotomy was in the left common iliac artery at the point where it bifurcates into the left internal and external iliac arteries. (App.B-p. A17) As a result of the first operation and post-operative treatment, Hulver suffered a thrombosis in the left common and external iliac arteries. As a further result of this operation, Hulver was unable to maintain an erection.

The second operation was performed by Dr. Nosti on December 12, 1968. This operation was an attempt to remove the thrombus which had developed in the left common and external iliac arteries. The operation involved insertion of a catheter through Mr. Hulver's left groin into the left common femoral artery downstream of the thrombus and up into the left external and common iliac arteries to remove the thrombus. The operation was not successful. (App.B-p. A18) Prior to this operation there had been no incision in Hulver's left groin or lower extremity. (The first operation was performed through one incision in Hulver's abdomen.)

From the date of Mr. Hulver's admission to the V. A. Hospital in October, 1968, up till the end of December, 1968, Mr. Hulver's case was assigned to Dr. Nosti. At that time Dr. Nosti was a fourth-year resident in surgery.

(App.B-p. A24) Dr. Nosti's rotation at V. A. Hospital ended on December 31, 1968. (App.B-p. A18)

Mr. Hulver's third operation was performed on March 10, 1969 by Dr. Ivan Keith Crosby who was assigned to Hulver's case after Dr. Nosti left the V. A. Hospital at the end of 1968. Dr. Crosby performed an aorto-femoral bypass to graft a dacron prosthesis from the terminal aorta to the left common femoral artery. This third operation was performed on the basis of an arteriogram which indicated that Hulver's left common and external iliac arteries were completely occluded. Following his third operation, Mr. Hulver was discharged from the V. A. Hospital on March 17, 1969. (App.B-pp. A18-A19)

The aorto-femoral bypass did not restore Hulver's left lower extremity to its condition prior to the operation of October 17, 1968. Following the March 10, 1969 operation, the condition of Hulver's left lower extremity improved slightly. He returned to work in early June, 1969. The condition, however, worsened in August, 1970 and Plaintiff was unable to continue his employment. He has been unemployed since that time. (App.B-p. A19)

Prior to the October 17, 1968 operation, Dr. Nosti had discussed with Mr. Hulver the surgical procedure he recommended. Dr. Nosti pointed out the arterial obstructions on both the right and left sides and told Hulver he would try to remove them. At that point Mr. Hulver told Dr. Nosti that his trouble was on the right side only, and that his left leg was all right. Hulver admonished Dr. Nosti not to touch his "left leg". (App.B-p. A26) After Plaintiff made that statement, Dr. Nosti did not make any further inquiry as to the meaning of Hulver's admonition; and Dr. Nosti did not explain the place or nature of the incision beyond the general area of the operation. Also, prior to that operation Dr. Nosti did not inform

Hulver of the risk and likelihood of impairment of sexual ability associated with an aortoiliac endarterectomy. (App. B-p. A26) The District Court found that if Mr. Hulver had been informed of Dr. Nosti's intention to remove the plaque from the left side, and if Hulver had been informed of the risk of impairment of his sexual ability, Dr. Nosti's qualifications and absence of supervision, Plaintiff Hulver would not have consented to the October 17, 1968 operation. (App.B-pp. A26-A27)

(Plaintiff's Knowledge)

After the October 17, 1968 operation, Hulver attempted unsuccessfully to have sexual relations with his wife. This occurred approximately two weeks after the operation and once again prior to the December 12, 1968 operation.

Plaintiff discussed his sexual impairment with Dr. Nosti sometime prior to his re-admission to the V. A. Hospital on December 2, 1968. Upon Plaintiff's inquiry, Dr. Nosti told Hulver that he *might* have severed some nerves. Dr. Nosti did not elaborate on that statement to explain that the damage was irreparable and more importantly, Dr. Nosti did not explain that sexual impairment was a risk known to be associated with an aortoiliac endarterectomy. Hulver testified that he did not understand what Dr. Nosti meant by his statement. (App.B-p. A38) He also testified that he did not understand the cause or nature of his sexual impairment until after the March 10, 1969 operation. Prior to the third operation, Hulver thought his sexual functions would return. Before the third operation Hulver instructed Dr. Crosby that "if you are going to have to open me up, I would appreciate it if you would look into this sexual problem that I have." To that Dr. Crosby "said that he would." (Tr.p. 177) After the March 10, 1969 operation, Mr. Hulver again asked

Dr. Crosby what he had found out about his sexual problem. Dr. Crosby informed Hulver that his sexual impairment was caused when sympathetic nerves surrounding the aorta were severed during the October 17, 1968 operation, and the damage was irreparable. (App.B-p. A39) Dr. Crosby did not tell Hulver the nerve severence and sexual impairment was a likely consequence of an aortoiliac endarterectomy.

With regard to the second arteriotomy into his left common iliac during the October 17, 1968 operation, Hulver noticed that his left leg was cold and numb when he awoke from the anesthesia following surgery. (App.B-p. A40) Hulver remarked to Dr. Nosti that he didn't know what Nosti had done. Hulver asked him "why did you go in there when I told you not to." (App.A-p. A8) But Dr. Nosti did not then, nor at any time during his treatment, tell Hulver he had made a second arterial incision into the left common iliac. (App.B-p. A40) Hulver testified he did not know just what they had done to his left leg. They had not operated on it and there was no scar. (Tr.pp. 235-236) It was not until January, 1971, when Hulver's attorney discovered the Operation Report in Plaintiff's hospital records, that he learned for the first time that a second endarterectomy had been performed in his left common iliac. (App.B-p. A40) Until January, 1971, Hulver was not on notice of facts sufficient to alert him that the disability of his left lower extremity was anything other than a normal complication of the endarterectomy performed on his right common iliac artery. (App.B-p. A40)

On November 20, 1968, Hulver filed an application with the Veterans' Administration for an increased disability rating. The application, which was not in Hulver's handwriting, stated that he had "lost basic functions of

sexual intercourse. Am now sterile." The stated cause on the claim form was "surgical intervention for arterial blockage with scar ranging from breast bone to right femoral region." Hulver testified that the handwriting and words were not his. He could only identify his signature on that form. (Tr.pp. 230-232) Hulver also testified that he understood the word "sterile" to be entirely different from "sexual intercourse." (Tr.pp. 231-232)

C. *The Proceedings Below*: On February 18, 1971, Isaac Newton Hulver filed an administrative claim with the Veterans' Administration seeking damages under the Federal Tort Claims Act, for injury sustained during three operations which allegedly were negligently performed by the Kansas City Veterans' Administration Hospital on October 17, 1968, December 12, 1968, and March 10, 1969. The V. A. denied Hulver's claim on August 17, 1971. On December 3, 1971 this lawsuit was filed in the United States District Court for the Western District of Missouri, Western Division.

On October 18, 1972, the United States moved for partial summary judgment on Mr. Hulver's action asserting that the two-year period of limitations under 28 U.S.C. §2401(b) precluded any claims based upon negligent acts or omissions occurring prior to February 18, 1971. Partial summary judgment was denied on April 10, 1975 in a District Court opinion reported at 393 F. Supp. 749 (W.D. Mo. 1975). (App. D) After completion of the pretrial proceedings, a non-jury trial was held on the issues of liability. In order to expedite entry of final judgment an interlocutory order determining the issues of liability in favor of Plaintiff was entered. (App. C) Thereafter, an evidentiary hearing on the issue of damages was held and damages were assessed. On August 9, 1976 the District Court entered Supplemental Findings of Fact, Conclusions

of Law and Final Judgment in Favor of Plaintiff on Issues of Liability and Damages. (App.B)

The District Court, in its detailed findings of fact and conclusions of law, found that Dr. Nosti was negligent with respect to the first operation in failing to understand and heed Plaintiff's admonition not to operate on his left side, in failing to apprise Hulver of the risks of impotency associated with the surgery, and in performing the endarterectomy on the left iliac artery in the absence of objective symptoms. Additionally, the District Court found that the V. A. Hospital negligently failed to properly monitor the pulses of Plaintiff's lower extremities during the week immediately following the first operation.

With regard to the time that Plaintiff's cause of action accrued, the District Court found that Plaintiff Isaac Newton Hulver did not fully understand either the cause or the permanent nature of his sexual impairment until after the March 10, 1969 operation, and until that time Plaintiff assumed his sexual functions would return. (App.B-p. A39) Specifically judging the credibility of the witnesses, the District Court found that Plaintiff was only fully informed of the cause and permanent nature of his sexual impairment *after* March 10, 1969. Additionally, the District Court in judging the credibility of the witnesses, found that only *after* March 10, 1969 was Plaintiff on notice of sufficient facts that he in the exercise of reasonable diligence should have discovered that Dr. Nosti had breached his duty to inform him of the risk of permanent sexual impairment before obtaining his consent to the October 17, 1968 operation. (App.B-p. A39)

The District Court made other specific findings with regard to the accrual of Mr. Hulver's claims based upon the negligence in the October 17, 1968 surgical proceedings.

The District Court found that upon Plaintiff's inquiry of Dr. Nosti following the October 17 operation, Dr. Nosti did not then or previously inform Plaintiff that he had performed a second endarterectomy on Plaintiff's left common iliac artery. The Court, judging the credibility of the witnesses and all of the surrounding circumstances, determined that Hulver was not on notice of sufficient facts to alert him that the disability of his left lower extremity was anything other than a normal complication of the endarterectomy performed on Plaintiff's right common iliac artery until Plaintiff discovered that a separate incision had been made in his left common iliac artery. (App.B-p. A40). The District Court also found that it would have been unreasonable for Hulver to initiate an investigation into possible acts of malpractice prior to April 15, 1969 when his continuing treatment at the V. A. Hospital ended and the permanence of the injury to his left lower extremity became apparent to him. (App.B-pp. A40-A41) The District Court in its detailed findings also found that Plaintiff did not fail to exercise reasonable diligence in discovering the alleged acts of malpractice prior to February 18, 1969. It was only after that date that his condition became so grave that a reasonable person would have been alerted to the possibility of lack of informed consent and negligence in the treatment received. (App.B-p. A42)

Notwithstanding the District Court's firsthand observation of the witnesses' credibility, the Court of Appeals reversed. The Court of Appeals, in reviewing the factual determinations of the District Court, concluded that Plaintiff's cause of action was barred by his failure to file a claim within two years of the time his cause of action accrued. Judge Van Oosterhout disagreed with the findings of fact made by the District Court, and determined that Plaintiff Isaac Newton Hulver had possession of suffi-

cient facts prior to February, 1969 to put a reasonable person upon inquiry as to whether a malpractice cause of action existed. (App.A-pp. A8-A9) The Court of Appeals, in reversing, relied on two pieces of evidence, which it extracted from the entire record. (App.A-pp. A5-A6) In fact, the Court of Appeals did not even have the entire record before it when it reversed the District Court's findings as clearly erroneous.[3]

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3. Following the Eighth Circuit's opinion, Plaintiff's attorneys inquired with the Office of the Clerk of the U. S. District Court for the Western District of Missouri, inquiring as to the location of the record. They were informed that the record had never been requested or shipped to the Eighth Circuit Court of Appeals in connection with the appeal in this case.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Amounts to Second-Guessing the Trial Court on Factual Determinations, and Will Result in Encouraging Frivolous Appeals and Factual Review at the Appellate Level.

Only one issue was raised in this appeal—when the Plaintiff's claims of medical malpractice accrued. In making that determination federal law applies; but the determination of what point in time a medical malpractice claim accrues is a question of fact to be determined by the trier of fact. *Ciccarone* v. *United States*, 486 F.2d 253 (3rd Cir. 1973); *Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975). In this case the Court of Appeals applied the same test as did the District Court—Whether the Plaintiff discovered or in the exercise of reasonable diligence should have discovered the acts constituting the alleged malpractice upon which his cause of action is based.

The Court of Appeals reviewed the record *de novo* and reached a different factual conclusion than the trial court had reached. It substituted its own findings of fact, in effect ignoring the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. The Court of Appeals based its decision on two small pieces of evidence. It attached fatal importance to the contents of one document (Hulver's application for an increased disability rating). At the same time, the Court of Appeals disregarded the testimony concerning that particular document. And still further, the Court of Appeals chose to rely on *one statement* made by Mr. Hulver in the course of his lengthy testimony. The Court of Appeals even acknowledged that its decision was based upon these "extracts." (App.A-p. A6)

Judge Becker's factual findings on the statute of limitations issues were based upon the live testimony of the Plaintiff, Dr. Nosti and Dr. Crosby. Judge Becker also made specific findings concerning Hulver's application for an increased disability rating. (App.B-p. A39) *Based upon the testimony and the contents of the application*, Judge Becker concluded:

> "Plaintiff's *testimony* that he was only fully informed of the cause and permanent nature of his impairment after March 10, 1969, is found credible. It was only then that he was on notice of sufficient facts that in the exercise of reasonable diligence he should have discovered that Dr. Nosti had breached his duty to advise him of the risk of permanent sexual impairment before obtaining his consent to the October 17, 1968, operation." (App.B-p. A39) (Emphasis added.)

Also, with respect to the accrual of Plaintiff's claims arising out of negligent surgery and treatment of his left lower extremity, specifically found that Hulver "was not on notice of facts sufficient to alert him that the disability of his left lower extremity was anything other than a normal complication of the endarterectomy performed on Plaintiff's right common iliac artery." (App.B-p. A40) That finding was also based upon Hulver's testimony.

There is no excuse for the Court of Appeals ignoring the District Court's findings and retrying this case on *part* of the record, giving no weight to Judge Becker's advantage in seeing, hearing and judging the credibility of the witnesses. All of Judge Becker's findings were supported by the evidence, and were based upon his determinations of credibility of witnesses who testified in connection with the factual issues.

Rule 52(a) prohibits this type of appellate review where live testimony and questions of credibility are involved in the trial court's fact findings. The standard under Rule 52(a) was described by this Court as whether "on the entire evidence" the appellate court is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 122 (1969). The decision of the Court of Appeals on its face fails to apply this standard of review. The appellate court relied on two *extracts* from the record in this case, choosing to disregard other significant portions of the record. Where there is live testimony surrounding a piece of documentary evidence, it is improper for an appellate court to disturb the trial court's factual findings concerning the evidence.

The decision of the Court of Appeals has far-reaching implications and effects. Appellate fact-finding undermines the federal judicial system. Appellate courts have never been vested with the power to decide factual issues *de novo*. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

With the growing dockets of the appellate courts in the federal judicial system, proper interpretation and application of Rule 52(a) is more important than ever.[4] Disregard for Rule 52(a) will substantially contribute to an overloading and clogging of federal appellate court dockets. In *Pendergrass* v. *New York Life Insurance Co.*, 181 F.2d 139 (8th Cir. 1950) Judge Sandborn aptly observed:

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4. In the twelve-month period ending June 30, 1977, there were new civil appeals filed, appealing from the findings of district courts in our federal court system. In that same period of time the appellate courts' backlog of cases grew to 15,444 (a 9.5% increase). 1977 Annual Report of the Director for the Twelve Month Period Ending June 30, 1977, Admin. Office of the United States Courts, pp. 65, 67.

"There is no logical reason for placing the findings of fact of a trial judge upon a substantially lower level of a conclusiveness than the findings of fact of a jury of laymen or those of an administrative agency, which may be set aside if only unsupported by substantial evidence. The findings of fact of a Trial Court should be accepted by this Court as being correct unless it can be clearly demonstrated that they are without adequate evidentiary support or were induced by an erroneous view of the law. The entire responsibility for deciding doubtful fact questions in a non-jury case, should be, and we think it is, that of the District Court. The existence of any doubt as to whether the Trial Court or this Court is the ultimate trier of fact issues in non-jury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the District Courts, and multiplies the number of Appeals in such cases." 181 F.2d at 138.

It has been noted that the "power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly." *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416, 417 (8th Cir. 1943), citing *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 113 F.2d 698 (8th Cir. 1940), *aff'd*, 313 U.S. 146 (1940). The departure from this concept will encourage appeals on factual findings. Our federal court system was simply not designed or intended to accommodate wholesale appeals on factual findings of the district court.

This Court presently has an excellent opportunity to review fully the proper scope and application of Rule 52(a). In *University of Missouri* v. *Gay Lib*, Petition for Cert. pending, No. 77-447, this Court is faced with

the application of Rule 52(a) where the trial court's findings were based on a "cold record"—i.e. stipulations, transcripts of an administrative hearing, exhibits and depositions. Here the record consisted of not only documentary evidence, but also live testimony surrounding the documentary evidence.

In the face of growing case backlogs at the appellate level of our federal judicial system, the impact of Rule 52(a) cannot be ignored. Unless further guidelines on Rule 52(a) review are given by this Court, our courts of appeals will become deluged with litigants seeking a "second trial" at the appellate level. This case affords the Court an opportunity to curtail that abuse of our federal appellate court system.

II. The Decision of the Court of Appeals Conflicts With Other Circuits on the Interpretation of the "Discovery Rule" on the Accrual of Medical Malpractice Claims Under the Federal Tort Claims Act.

In making its factual determination of when Plaintiff's claims accrued, the District Court applied the "discovery rule":

> ". . . The federal courts have held that in medical malpractice actions against the United States the limitation period does not begin to run until '. . . the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice upon which the cause of action is based.'" (App.B-p. A41)

In applying that test to the facts in this case, the trial court considered both Hulver's knowledge of the injuries and Hulver's knowledge of the *cause* of his injuries. On Hulver's claims arising out of his sexual impairment, the

District Court found that it was after March 10, 1969 that Hulver was "on notice of sufficient facts that in the exercise of reasonable diligence he should have discovered that Dr. Nosti had breached his duty to advise him of the risk of permanent sexual impairment before obtaining his consent to the October 17, 1968, operation." (App.B-p. A39) With regard to Hulver's claims arising out of negligent treatment of his left lower extremity, the District Court found that "Plaintiff's testimony that he was only fully informed of the cause and permanent nature of his impairment after March 10, 1969, is found credible." (App. B-p. A39) Thus, the District Court, in applying the "discovery rule" did not attach fatal importance to the question of when Hulver first became aware of the injuries which resulted from the Defendant's malpractice. Rather, the District Court considered Plaintiff's knowledge of the *cause* (negligent acts of the Defendants) of his injuries. How could an uneducated man having no medical education or training, undergoing three serious operations in a span of six months, be expected to know the technicalities of cardiovascular surgery?

The interpretation and conclusions reached by the District Court are in accord with decisions of courts of appeals in other circuits in their interpretation of the discovery rule. In *Portis* v. *United States,* 483 F.2d 670 (4th Cir. 1973), it was held that the Plaintiff's medical malpractice Federal Tort Claim did not accrue until the claimant knew or reasonably could have known the *cause* of the injury. There the claimant's deafness was the injury complained of. While the parents of the claimant knew of the deafness, it was held that the medical malpractice claim did not accrue until the claimants reasonably should have known that the deafness was caused by hypodermic injections which had mistakenly been administered in an Air

Force hospital. The Fourth Circuit concluded that the medical malpractice claim did not accrue when the parents obtained knowledge of the deafness. Rather, the claim accrued only when the parents obtained knowledge of the *cause* of the deafness.

Other circuits have also followed this interpretation of the discovery rule. In *Caron* v. *United States,* 548 F.2d 366 (1st Cir. 1976), the First Circuit determined that the claimant's cause of action did not accrue prior to the time that the *cause* of the injuries had been determined. There the claimant's action was based upon adult dose immunization injections administered to a child which resulted in grand mal seizures and permanent retardation of the child. Even though the claimants were aware of the nature of the child's injuries in that case, they lacked knowledge of the *cause* of the injuries. The court there determined that the medical malpractice claim did not accrue, however, until the claimants discovered or reasonably could have discovered the *cause* of the child's convulsions and mental retardation. The same interpretation of the "discovery rule" was applied by the Fifth Circuit in *Quinton* v. *United States,* 304 F.2d 234 (5th Cir. 1962).

Contrary to the First, Fourth and Fifth Circuits, the Eighth Circuit Court of Appeals has interpreted the "discovery rule" in such a manner that knowledge of the injuries is the only consideration in determining when a medical malpractice claim accrues. Contrary to the District Court's findings, the Eighth Circuit Court of Appeals in its *de novo* review of the facts in this case, concluded that Plaintiff had sufficient knowledge to alert him that his sexual functions had been severely impaired shortly after the October operation. The Court of Appeals completely disregarded the District Court's findings that

Hulver at no time prior to March 10, 1969, had any information that the sexual impairment was a risk commonly associated with an aortoiliac endarterectomy. Further the Court of Appeals disregarded the District Court's finding that Hulver had no knowledge of the endarterectomy on his left common iliac until January, 1971. Thus the Court of Appeals examined only the Plaintiff's knowledge of the injuries themselves, and did not consider the Plaintiff's knowledge of the alleged acts of malpractice or the cause of the injuries.

The interpretation of the "discovery rule" which has been applied by the Eighth Circuit Court of Appeals is not only harsh, but is illogical. The Eighth Circuit's interpretation puts the Plaintiff to the burden of possessing medical knowledge equal to that of a physician or cardiovascular surgeon in this case. Further, the Court of Appeals' application of the "discovery rule" in this case amounts to a substantially different test than that which has been applied uniformly by other circuits on the question of when a medical malpractice claim accrues under the Federal Tort Claims Act.

It is suggested that the split in the circuits on this question is of extreme importance, and the conflict should be resolved by a decision from this Court. The question affects not only veterans and servicemen, but all members of their families who receive treatment in V. A. Hospitals and armed forces hospitals across the land. Certainly, it was the intent of Congress to create uniformity in determining when a claim accrues against the government under 28 U.S.C. §2401(b). See *Quinton* v. *United States,* supra, at 236. The uniformity desired by Congress has now been destroyed by the conflicting interpretations of the "discovery rule" being applied by the Courts of Appeals across the land. Isaac Newton Hulver, as well as other veterans,

servicemen and their families, should be afforded clarification on the crucial question of when a medical malpractice claim accrues under the Federal Tort Claims Act.

III. The Application of the "Continuous Treatment Rule" to Medical Malpractice Claims Under the Federal Tort Claims Act Has Never Been Decided by This Court.

This is the first reported appellate decision in which the facts sharply present the issue of whether the "continuous treatment rule" applies to medical malpractice claims brought under the Federal Tort Claims Act. In this case, Isaac Newton Hulver was admitted to the V. A. Hospital in October, 1968. He underwent surgery on October 17, 1968, and on December 12, 1968. During that time and up till December 31, 1968, Mr. Hulver remained under the continuous treatment of Dr. Juan Carlos Nosti. Dr. Nosti ended his internship at the V. A. Hospital on December 31, 1968. However, following that, Mr. Hulver remained under the continuous treatment of the V. A. Hospital in Kansas City, Missouri, and underwent surgery again on March 10, 1969. His third operation was performed by Dr. Crosby, who was assigned to Mr. Hulver's case after Dr. Nosti left the V. A. Hospital.

Many courts of appeals have mentioned the "continuous treatment rule" in connection with medical malpractice claims brought under the Federal Tort Claims Act; but in all previous cases which mention this rule, the courts of appeals have determined that it was not applicable to the facts of the given case. Thus, no appellate court has decided the question of whether the "continuous treatment rule" applies to medical malpractice claims brought under the Federal Tort Claims Act. See, for example, *Brown* v. *United States*, 353 F.2d 578 (9th Cir. 1965);

Ashley v. *United States*, 413 F.2d 490 (9th Cir. 1969); *Accardi* v. *United States*, 372 F.Supp. 205 (S.D.N.Y. 1974); *Cooper* v. *United States*, 442 F.2d 908 (7th Cir. 1971); *Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975); and *Kossick* v. *United States*, 330 F.2d 933 (2nd Cir. 1964), cert. denied, 379 U.S. 837 (1964). In *Kossick* the Second Circuit tacitly recognized the application of the continuous treatment rule under the Federal Tort Claims Act:

> "There is much good sense in Chief Judge Desmond's observation in the *Borgia* case that 'It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent. . . .' and this is not altogether without application when as here the summons would be served on the United States Attorney. . ." 330 F.2d at 936, citing *Borgia* v. *City of New York*, 237 N.Y.S.2d 319 (N.Y.App. 1962)

In *Kossick*, however, the Second Circuit determined that the continuous treatment rule did not apply to the facts in that case since the claimant had not been undergoing continuous treatment in connection with the injuries resulting from the malpractice.

The State of New York has clearly adopted the continuous treatment rule in the case of *Borgia* v. *City of New York*, 237 N.Y.S.2d 319 (N.Y.App. 1962). In that case the New York Court of Appeals clearly stated that the continuous treatment rule tolls a statute of limitations for the period of time that a patient is in the continuous treatment of either a physician or hospital. The New York Court of Appeals in adopting this rule, limited the rule's application to treatment for the same or related illness or injury continuing after the alleged acts of malpractice. As the Court of Appeals there noted, the con-

tinuous treatment rule is fair and logical and avoids the harsh result of barring claims where the claimant was under the continuous treatment of the doctor or hospital.

The observations made by the Eighth Circuit Court of Appeals in its decision in this case is directly contrary to the observations of the Second Circuit in *Kossick*. In this decision the Court of Appeals decided that the continuous treatment rule does not apply to anything other than continuous treatment by the same physician. The Court of Appeals in this decision completely negated the continuous treatment rule to the extent that it applies to continuous treatment from the same hospital. There was no question that Isaac Newton Hulver was continuously treated at the V. A. Hospital in Kansas City, Missouri. Further, the facts are undisputed in this case that Isaac Newton Hulver was treated continuously by Dr. Nosti up until the end of December, 1968. When Dr. Nosti rotated off of the surgical service at the V. A. Hospital in Kansas City, Missouri, Mr. Hulver's case was then assigned to Dr. Crosby. In this action, the Plaintiff Isaac Newton Hulver had absolutely nothing to do with the change in physicians. His relationship at all times was with the V. A. Hospital in Kansas City, Missouri, and not with any specific physician of his choosing. More importantly, the District Court found negligence on the part of the V. A. Hospital in the inadequate monitoring of Hulver following the October 17, 1968 operation. That finding was undisturbed on appeal. After the October 17, 1968 operation Hulver remained in the continuous treatment of the V. A. Hospital until at least March 10, 1969.

The application of the continuous treatment rule and the extent of the continuous treatment rule has been considered by various courts of appeals in connection with medical malpractice claims brought under the Federal Tort

Claims Act. Never has a set of facts presented itself as clearly as this in which the application and extent of the continuous treatment rule could be determined.

This case should be reviewed by this Court since it presents a significant Federal question which has not yet been resolved. The issue affects not only medical malpractice claims of all veterans who receive treatment by V. A. Hospitals, but also members of their families who are treated at V. A. Hospitals across the nation. The issue is of crucial importance in that it either cuts off or gives life to many malpractice claims. It deserves the review of this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that this Petition should be granted, and a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 76-2010 and 76-2011

Isaac Newton Hulver,
Appellee,
v.
United States of America,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: May 18, 1977

Filed: September 14, 1977

Before VAN OOSTERHOUT, Senior Circuit Judge, STEPHENSON and WEBSTER, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

The sole issue presented by these appeals by the United States of America is whether the trial court erred in holding that plaintiff's medical malpractice claim was not barred by the two-year limitation period of 28 U.S.C. § 2401(b). Plaintiff in his brief specifically agrees that the only issue raised by these appeals is when the medical

malpractice cause of action accrued under 28 U.S.C. § 2401(b).

All proceedings were before Chief Judge Becker without a jury. The Government's motion for summary judgment was denied for reasons stated in a memorandum opinion reported at 393 F.Supp. 749 (W.D. Mo. 1975). Thereafter a separate trial was held on the liability issue and later a trial was held on the damage issue. These appeals are from the final judgment on the issue of liability and damages entered on June 24, 1976, and the supplemental findings of fact, conclusions of law, and final judgment in favor of plaintiff on the issue of liability and damages entered on August 9, 1976. Detailed memorandum opinions (not reported) were filed in support of the judgments.

Three separate operations were performed on plaintiff Hulver at the Veterans Hospital at Kansas City, Missouri. The first operation occurred on October 17, 1968, with subsequent operations on December 12, 1968, and March 10, 1969. The first two operations were performed by Dr. Nosti who severed his connections with the Veterans Hospital on December 31, 1968. The March 1969 operation was performed by Dr. Crosby, a senior resident surgeon. The court, on the basis of detailed findings of fact, determined negligence on the part of Dr. Nosti and the Veterans Administration in connection with the October 17 operation only. Judge Becker in his unreported memorandum opinions makes detailed factfindings and conclusions of law, and describes the nature of the operations very well. The ultimate determination that Dr. Nosti was negligent with respect to the first operation, at least in some respects, is supported by substantial evidence and is not challenged in these appeals. Accordingly the details of the operation are significant only to the extent that

they bear on the limitations issue. Pertinent facts will be set out in connection with our discussion of when the cause of action accrued.

We now reach the only issue before us and determine that plaintiff's cause of action was barred by his failure to file a claim within two years of the time his cause of action accrued for the reasons hereinafter stated.

The operation with respect to which the trial court found Dr. Nosti and the Veterans Hospital negligent was performed on October 17, 1968. The required written claim for negligent malpractice is dated February 18, 1971. The trial court determined that it was filed with the Veterans Administration on February 22, 1971.[1]

The crucial issue in these cases is whether plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice upon which his cause of action is brought more than two years prior to February 1971.

The applicable law with respect to accrual of negligent malpractice cases was thoroughly considered and stated in our recent case of *Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975). We there stated and held:

> 28 U.S.C. § 2401(b) states, in relevant part:
>
> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *. When the claim "accrues" is a matter of federal law.
>
> * * *

---

1. Whether the claim was filed on February 18 or February 22, 1971, makes no difference in the result under the facts of this case.

In medical malpractice actions, the claim "accrues" when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice upon which the cause of action is based. *Id.* at 148.

• • •

Once the appellant knew of the allegedly negligent acts that caused her injury, she was under a duty to exercise reasonable diligence in bringing suit. *Id.* at 149.

• • •

But when the facts became so grave as to alert a reasonable person that there may have been negligence related to the treatment received, the statute of limitations began to run against the appellant's cause of action. *Id.* at 150.

[Numerous cases cited in support of the foregoing statements are omitted.]

The Reilly court determined that the facts of the case were such that the plaintiff should have been aware of her cause of action more than two years prior to the filing of the administrative claim.

In applying the law as established in *Reilly* to the facts of this case, we are convinced that the determination made by the district court that the cause of action did not accrue more than two years prior to the filing of the administrative claim was not supported by substantial evidence and is clearly erroneous.

Plaintiff was a World War II veteran. He was fifty-six years of age at the time of his 1968 operation. He received severe combat wounds in Germany in his abdomen and right leg. Fifteen operations were performed by military surgeons. Plaintiff was discharged from the service in 1945 with 100% disability which was reduced to 70% in 1946. He has had considerable trouble with his right leg ever since but he has not had trouble with his left leg. From 1953 to 1971 plaintiff was employed in the monotype department of the Kansas City Star. He had a history of generalized arteriosclerosis and had suffered a heart attack in 1956. He was referred to the Veterans Hospital in 1968 by his private physician for diagnosis and treatment of numbness, paresthesia, and claudication, or cramplike pains, in his right hip and leg which caused him to limp. The October 1968 operation is described as a bilateral aortoiliac endarterectomy, the operation performed by Dr. Nosti. He removed obstructive plaque from the left and right common iliac arteries (which branch off from the aorta in a Y shape). As a result of the operation, plaintiff's left leg, which had previously caused him no pain or trouble, was disabled by a clot that formed in the left branch of the arterial tree in the weeks following the operation. In addition, his sexual function was seriously impaired. The second operation performed by Dr. Nosti was an unsuccessful attempt to remove the clot in the left leg by an incision in the left leg. The third operation performed by Dr. Crosby was a bypass operation involving the insertion of a plastic tube. As above stated, no negligence was found by the trial court with respect to the second and third operations and no cross appeal has been taken from such finding and determination.

With respect to the loss of sexual functions, the evidence establishes that the plaintiff had normal relations with his wife just prior to the October operation and that shortly after his return from the hospital after the operation he discovered his lack of sexual functions, and subsequent attempts showed that such condition continued. The

trial court, in its unreported memorandum filed August 9, 1976, states:

> Plaintiff discussed his sexual impairment with Dr. Nosti sometime prior to his readmission to the V.A. Hospital on December 2, 1968, probably during his examination by Dr. Nosti on November 20. Dr. Nosti told plaintiff he was afraid he might have severed some nerves. However, Dr. Nosti did not further elaborate on that statement to explain that sexual impairment was a risk known to be associated with an aortoiliac endarterectomy, or that the damage was irreparable. Plaintiff testified that he did not understand what Dr. Nosti meant by his statement.
>
> On November 20, 1968, plaintiff filed an application with the Veteran's Hospital for an increase in his disability rating in which he stated:
>
> > Have lost the basic functions of Sexual Intercourse. Am now sterile. Previous Sexual Intercourse average 3 times per week now zero.
>
> As the cause of this disability, plaintiff stated:
>
> Had Surgical Intervention for Arterial Blockage with Scar Ranging from Breast Bone to right Femoral Region.

We determine that the finding in the above extract clearly and conclusively demonstrates that the plaintiff had sufficient information prior to December 1968 that his sexual functions were severely impaired and that such impairment was caused by the severing of a nerve during the October operation and that such damage was likely irreparable. Such view is strongly supported by the November 20, 1968, claim for increased disability filed with the Veterans Administration.

With respect to the claim of negligent injury to the left leg, plaintiff claimed and the court ruled that the plaintiff was not aware that acts of malpractice may have occurred prior to January 1971 when he and his lawyer examined the hospital records which disclosed that the operation had included the left leg artery. His lawyer then called his attention to the fact that the hospital operation records disclosed that an incision had been made to remove a plaque an inch below the bifurcation of the aorta in the left iliac artery.

Plaintiff's left leg injury claim is based primarily on Dr. Nosti's alleged violation of plaintiff's direction not to touch his left leg. Plaintiff testified:

> THE COURT: They want to know when you realized first that an operation had been performed on your left leg. You say you woke up.
>
> • • •
>
> THE COURT: He was told, as well as he had the symptoms. You did learn that at sometime there was an operation on your left side performed in October 1968, didn't you?
>
> • • •
>
> THE WITNESS: When I woke up from coming from the operating room, Your Honor, I knew there was something wrong with my left leg, which I had told them not to do.
>
> THE COURT: He is trying to ask you when you first became aware in some manner that the operation had involved the artery leading to your left leg.
>
> • • •
>
> THE WITNESS: Left leg. When I woke up from the anesthetic.

Prior to the operation in December 1968 to attempt to remove the block in the left artery, plaintiff had a discussion with Dr. Nosti. He testified with respect to such conversation as follows:

> Q. Did Dr. Nosti ever tell you why he went into the area on the left leg in October 17, 1968, operation?
>
> A. No, he didn't say.
>
> Q. Did you ever ask him?
>
> A. I just asked him why, after I had told him not to go in there and fool with the left side, that he did it.

Mr. Spiegelhalter, a fellow employee of plaintiff at the Kansas City Star, testified that on the occasion of his visit with plaintiff at the hospital shortly after the operation: "He made a remark, he said, by God, when I went in, my left leg was perfectly well, and I told them not to bother it, and he said, apparently they did." Plaintiff's brother Eddie testified he told him shortly after the operation, "Eddie, they have ruined my good leg."

In *Brown* v. *United States*, 353 F.2d 578, 580 (9th Cir. 1965), the court states:

> To expect a doctor, voluntarily, absent an inquiry and absent special situations not existent here, to affirmatively advise a patient that he has been negligently treated, is unrealistic, and no cases have ever so held.

Dr. Nosti did not dispute plaintiff's statement to him that he had operated on his left leg, and the left leg operation is clearly shown on the hospital report of the operation. The evidence, including plaintiff's own statements, establishes that prior to February 1969 plaintiff had possession and knowledge of facts sufficient to alert

a reasonable person that there may have been negligence relating to the grievance for which the complaint was subsequently made.[2]

We hold that the trial court's determination that plaintiff did not have possession of sufficient facts prior to February 1969 to put a reasonable person upon inquiry as to whether a malpractice cause of action existed is not supported by substantial evidence and is clearly erroneous.

The trial court in its August 9, 1976, opinion, states:

> Even if plaintiff showed a lack of diligence in waiting until December, 1970 to initiate an investigation into possible acts of malpractice, it would have been unreasonable for him to initiate an investigation prior to April 15, 1969, when his continuing treatment at the V. A. Hospital ended and the permanence of the injury to his left lower extremity became apparent to him.

---

2. The Government in the trial court raised the issue that the October 17 operation constituted an assault and battery and hence did not fall within the scope of actions authorized by the Federal Tort Claims Act for the reason that the court is without jurisdiction of an injury caused by an assault and battery by reason of the exclusion of assault and battery contained in 28 U.S.C. § 2680(h). Such defense is discussed by the trial court in its reported opinion on the summary judgment at pp. 752 and 753 of 393 F.Supp. It is also discussed in the memorandum of August 9, 1976, awarding final judgment. The trial court there holds that the evidence did not support a finding that Dr. Nosti did intentionally perform an operation on the left leg in disregard of plaintiff's instructions not to touch the left leg, but rather that Dr. Nosti negligently failed to understand plaintiff's directions, probably because of language difficulties in communication. Plaintiff's written consent was broad enough to cover the left leg surgery.

In any event, if the court had found the operation was in violation of plaintiff's informed consent, an action would likely be barred by the assault and battery exception under our holding in *Moos* v. *United States*, 225 F.2d 705 (8th Cir. 1955).

In *Brown* v. *United States*, *supra* at 580, the court stated:

> The reason for the rule which appellants advance is that one is presumed to repose confidence in the individual doctor to whom he entrusts his medical problems and that the confidential relationship excuses the making of inquiry which questions the care which has been or is being given during the existence of the relationship.
>
> We cannot accept the proposition that one who continues to receive treatment from succeeding government physicians is, regardless of the circumstances, excused from conducting diligent inquiry into the conduct of a doctor with whom a personal relationship has been terminated and who is not claimed to have acted in direct concert with the succeeding physicians.

Accord, Ciccarone v. *United States*, 486 F.2d 253, 257 (3d Cir. 1973); *Ashley* v. *United States*, 413 F.2d 490, 493 (9th Cir. 1969). *See Reilly* v. *United States*, *supra*.

It is also well-established that one who knows he has suffered from medical malpractice may not postpone an action until the full extent of his damage is ascertained. *Ashley* v. *United States*, *supra*; *Toal* v. *United States*, 438 F.2d 222, 225 (2d Cir. 1971). Dr. Nosti's care of plaintiff ceased no later than December 31, 1968. Dr. Crosby, who took over the treatment, had no prior connection with plaintiff's treatment. Any reason for delaying a reasonable inquiry into the facts ceased no later than December 31, 1968.

As heretofore determined, plaintiff had adequate information to put him on inquiry with respect to his malpractice claims more than two years prior to his filing

of the administrative claims. The trial court's determination to the contrary is not supported by substantial evidence and is clearly erroneous.

The judgment is reversed. The case is remanded to the trial court with directions to dismiss the complaint on the ground that the action is barred by 28 U.S.C. § 2401(b).

Reversed and remanded.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

Civil Action No. 19917-3

ISAAC NEWTON HULVER,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT IN FAVOR OF PLAINTIFF ON ISSUES OF LIABILITY AND DAMAGES*

(Filed August 9, 1976)

This is a civil action for damages under the Federal Tort Claims Act, Section 2671, *et seq.*, Title 28, United States Code. Plaintiff alleges that he has suffered disability of his left leg and a loss of sexual function as a result of various alleged acts of medical malpractice by physicians and employees of the Kansas City, Missouri Veteran's Administration Hospital (hereinafter "V.A. Hospital") in the course of surgical treatment of an arterio-

*These detailed findings of fact and conclusions of law are intended to supplement the brief findings and conclusions made June 24, 1976.

sclerotic disease causing impairment of the function of his right lower extremity in 1968 and 1969.[1]

Subject matter jurisdiction exists under Section 1346(b), Title 28, United States Code.

At the close of discovery, and after the filing of Standard Pretrial Order No. 2,[2] defendant filed a motion for partial summary judgment on the independent grounds that: (1) plaintiff's claim that an operation performed on October 17, 1968, in the area of the aorta and the bifurcation of his left common iliac artery was performed without his informed consent, and extended beyond the scope of the operation to which he consented, is excluded from the Federal Tort Claims Act by virtue of the "assault and battery" exclusion in Section 2680(h), Title 28, United States Code; and (2) that plaintiff's claims arising out of alleged negligent acts or omissions of the government occurring on or before February 22, 1969, are barred by the two year statute of limitations of Section 2401(b), Title 28, United States Code. In a published opinion the motion was denied because of the presence of litigable issues of material fact with respect to both grounds. *Hulver* v. *United States*, 393 F.Supp. 749 (W.D. Mo. 1975).

After completion of the pretrial proceedings, a plenary evidentiary trial without a jury was held on the issue of liability. Section 2402, Title 28, United States Code.

1. The complaint originally contained in Count II a claim for damages by plaintiff's wife, Grace Maxine Hulver, for loss of consortium as a result of the alleged acts of malpractice. However, Count II was dismissed on April 25, 1972 because of Mrs. Hulver's failure to state in her administrative claim a "claim for money damages in a sum certain."

2. Local Rule 20 of the United States District Court for the Western District of Missouri.

Both plaintiff and defendant filed additional briefs on the statute of limitations issue, and submitted proposed findings of fact and conclusions of law.

In order to expedite entry of a final judgment, an interlocutory order determining the issue of liability in favor of plaintiff was entered. Thereafter, a plenary evidentiary trial on the issue of damages was held and damages were assessed.

After a careful review of the controverted factual and legal contentions of the parties, the stipulated facts, and the evidence presented, the following final findings of fact and conclusions of law have been made.

I. *Findings of Fact on Issue of Liability.*

Plaintiff, Isaac Newton Hulver, is, and at all times material has been, a resident of the Western District of Missouri. He was 56 years old, married and sexually potent at the time he entered the V.A. Hospital in October, 1968 for treatment.

Defendant, United States of America, at all times material operated a Veteran's Administration Hospital in Kansas City, Missouri, through the Veteran's Administration, and its agents and employees.

Plaintiff is an army veteran who served in World War II. While in combat in Germany, he was severely wounded in the abdomen and right leg by machine gun bullets and shrapnel. According to his undisputed testimony, military surgeons performed about fifteen different operations in the area of his abdomen as a result of his wounds. He was discharged in 1945 with a 100 per cent disability rating, which, according to plaintiff, was reduced to a 70 per cent rating in 1946.

From 1953 until 1971, he worked in the monotype department of the Kansas City Star Company, a publisher of daily newspapers. He was required in the course of his employment to lift heavy metal and galleys of type weighing up to 70 pounds. When the surgery in question occurred, he had a history of generalized arteriosclerosis, and had suffered a heart attack in 1956.

In September, 1968, plaintiff's personal physician, Dr. Robert N. Hodge, referred plaintiff to the V.A. Hospital for diagnosis and treatment of numbness, paresthesia, and claudication, or cramplike pains, in his right hip and leg which caused him to limp [hereinafter the hip and leg will be referred to as the "lower extremity"]. These sensations were precipitated by plaintiff's walking short distances or standing on his feet for a substantial but short length of time. The condition had existed to some degree for a number of years, but had worsened progressively over the three years prior to 1968. Plaintiff testified that this condition only existed in his right lower extremity prior to the first of three operations in question; and that his left lower extremity had never caused him any functional problems. His testimony to this effect was corroborated by Dr. Hodge and a number of fellow employees, acquaintances, and relatives, including Carl McAnally, a hunting companion, Richard Miller, James F. Wells, William T. Spiegelhalter and Thomas Maschler, fellow employees, by Grace Maxine Hulver, plaintiff's wife, and James Edward Hulver, plaintiff's brother. Plaintiff further testified that prior to October 1, 1968, he was sexually potent and able to function normally sexually. His wife corroborated this testimony. It is factually found that prior to October 1, 1968, plaintiff's disabling symptoms were confined to his right lower extremity and that he suffered from no sexual impairment prior to the initial operation in 1968.

Plaintiff underwent three different operations at the V.A. Hospital in the six months after October 1, 1968, to correct his condition and resulting complications. The evidence clearly proves that plaintiff's ability to function sexually was severely and permanently impaired as a result of the first of the three operations. The evidence is also clear, and it is found, that plaintiff's left lower extremity became partially disabled as a result of the first operation, and this disability was not corrected by the second and third operations. Although the function of plaintiff's left lower extremity improved somewhat in late 1969, it grew worse in August, 1971 and its function continues to be impaired permanently. Before making specific findings with respect to the treatment plaintiff received, it will be helpful to describe the arteries concerned; the operations performed; and the acts of malpractice which occurred.

The aorta is the largest artery in the body by which blood leaves the heart. It begins at the outlet of the left ventricle of the heart, travels upward for a short distance, then makes an arch, turns downward and runs through the chest and abdomen in front of the spine. In the spine at approximately the fourth lumbar vertebra (L-4), the aorta bifurcates into the left and right common iliac arteries which provide blood to the lower extremities. Each common iliac artery travels downward for approximately two and one-half inches, and then bifurcates into the internal and external iliac arteries on both sides of each lower extremity. The external iliac artery, which supplies blood to the abdominal wall, external genital organs, and the lower limb, continues downward in the lower extremity to become the common femoral artery.

The first operation was performed on October 17, 1968, by Dr. Jaun Carlos Nosti after plaintiff's condition was

diagnosed as arteriosclerotic occlusive disease. Dr. Nosti, a resident surgeon, had never performed this particular operation before. This operation was variously referred to by the expert witnesses at the trial as an "aortoiliac reconstruction"; a "bilateral aortoiliac endarterectomy"; and an "aortoiliac endarterectomy on the right side and left common iliac endarterectomy." The latter description is probably the most accurate. An endarterectomy is a surgical procedure to remove a thrombus or arteriosclerotic plaque from the inner lining, or intima, of an artery. During the course of the October 17, 1968, operation, Dr. Nosti made two separate arterial incisions, or arteriotomies. The first incision was in the terminal aorta down into the right common iliac artery where the aorta branches into the left and right common iliac arteries. The second was lower down the left common iliac artery at the point where it bifurcates into the left internal and external iliac arteries.

Following this operation, plaintiff suffered a thrombosis in his left common and external iliac arteries which continues to disable his left lower extremity. After this operation plaintiff discovered that his ability to function sexually had been severely impaired.

The acts of malpractice alleged with respect to his first operation are generally: (1) that (a) the surgeon's decision to make a separate incision in plaintiff's left common iliac artery was based on an inadequate and improper diagnosis, and (b) was not justified by plaintiff's subjective complaints; (2) that Dr. Nosti failed to obtain plaintiff's informed consent for the operation by failing to advise plaintiff of his limited experience in vascular surgery, of risks associated with the operation including the risk of impairment of sexual functions, and of his decision

to expand the operation to include the left common iliac artery if deemed advisable or necessary during the course of the operation; (3) that Dr. Nosti performed the operation without adequate staff supervision by a physician or surgeon with mature competence in the type of vascular surgery undertaken; (4) that plaintiff's sexual impairment resulted from excessive dissection of the aorta and associated nerves during the operation; and (5) that inadequate monitoring of the circulation in plaintiff's left lower extremity following the operation resulted in a failure to detect and correct the post-operative thrombosis before it could cause permanent damage.

The second operation was performed by Dr. Nosti on December 12, 1968, in an attempt to remove the thrombus which developed in the left common and external iliac arteries. This operation, a Fogarty catheter embolectomy, involved insertion of a catheter through plaintiff's left groin into the left common femoral artery downstream of the thrombus and up into the left external and common iliac arteries to remove the thrombus. This operation was not ultimately successful. Plaintiff alleges that it was negligent to delay performing this operation until December 12, 1968. He does not allege any other acts of malpractice in the manner in which the operation was performed.

The third operation was performed on March 10, 1969, by Dr. Ivan Keith Crosby who accepted plaintiff's case after Dr. Nosti left the V.A. Hospital at the end of 1968. An arteriogram, see *infra*, p. 13 [App. A22-A23], had disclosed that plaintiff's left common and external iliac arteries were completely occluded. Dr. Crosby performed an aorto-femoral bypass to graft a dacron prosthesis from the terminal aorta to the left common femoral artery. Plaintiff

was discharged from the V.A. Hospital on March 17, 1969, but returned on March 19, 1969, after an infection set in around the implanted prosthesis. This infection was successfully treated surgically on March 22, 1969. The aorto-femoral bypass has not restored plaintiff's left lower extremity to its condition prior to the operation of October 17, 1968. Plaintiff originally alleged negligence in failure to prevent the post-operative infection. However, plaintiff abandoned this claim of negligence at trial. The evidence discloses that such infections are common complications of an aorto-femoral bypass, and that there was no negligence in failing to prevent, or in treatment of, the infection.[3]

Following the March 10, 1969, operation, the condition of plaintiff's left lower extremity improved slightly. He returned to his employment at the Kansas City Star in early June, 1969. However, the condition worsened in August, 1970, and plaintiff was unable to continue with his employment. He has not been employed since that time.

The findings of fact with respect to each of the alleged acts of malpractice will be made under separate subheadings.

A. *Decision to Operate on Left Common Iliac Artery.*

Following Dr. Hodge's referral, on October 1, 1968, plaintiff was admitted to the V.A. Hospital for diagnosis and treatment. He was examined by Dr. G. C. Carr and a Dr. Perez on the staff, both of whom found evidence of arterial insufficiency in both lower extremities despite the fact that plaintiff's subjective complaints were confined

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3. The acts of malpractice alleged for the three operations are summarized from "Plaintiff Isaac Newton Hulver's Supplemental Answers to Defendant's Second Set of Interrogatories" filed February 19, 1976.

to his right lower extremity.[4] Plaintiff was then sent home on a pass until October 7, 1968.

Plaintiff returned to the V.A. Hospital on October 7, 1968. His medical history was taken by a medical student in training at the V.A. Hospital. The history was countersigned by Dr. Nosti, who was then a fourth year resident in surgery serving at the V.A. Hospital on a rotational basis from the Kansas University Medical School. The date of the countersignature by Dr. Nosti does not appear in the hospital records.[5] Dr. Nosti testified that his countersignature does not mean that he was present when the history was taken, but merely that he approved of the history taken. No history by a staff physician with mature competence in vascular surgery, or under personal supervision of such a physician, was ever taken.

Plaintiff was given a complete physical examination including routine blood tests, an EKG, and chest and abdominal x-rays. A physical examination made by the same medical student when plaintiff's history was taken, revealed a diminished left femoral pulse and an absence of all other lower extremity pulses including the right femoral, the right and left popliteal, and the right and left posterior and dorsalis pedis pulses. These findings differed somewhat from those of Dr. Nosti on later occasions prior to October 17, 1968, including one in an undated report which stated plaintiff's right femoral pulse was 2+. (3+ was normal.) The left pulse was only 1+, and all other lower extremity pulses absent (or 0 on the 0 to 3+ scale).[6] The latter report by Dr. Nosti was inconsistent with a review of plaintiff's objective signs in Dr. Nosti's

4. Plaintiff's Exhibit No. 1 [hereinafter "Pl.Ex. No. 1"], at 260, 262.

5. *Id.*, at 255-259.

6. *Id.*, at 331.

operation report which stated that plaintiff ". . . had a good femoral pulse on the left side but on the right side the right femoral pulse was decreased in intensity."[7] Dr. Nosti testified that a dictation error in the operation report accounted for the inconsistency.

Dr. Nosti also testified that he examined plaintiff's lower extremities for color, temperature, hair loss, and shrinking or edema, and discovered both to be cold and the hair on both to be thin. Dr. Ivan Keith Crosby, an experienced vascular surgeon, testified that such objective signs are important factors to be considered in deciding whether surgery should be performed. Two other experienced vascular surgeons, Dr. Alfred Heilbrun, then chief of surgical services at the V.A. Hospital, and Dr. Clark L. Henry who has 20 years experience in vascular surgery, testified that such signs may or may not be significant. However, despite Dr. Nosti's testimony that he made such an examination, no record of his findings appears in the hospital record. Dr. Joseph Lichtor, an expert witness called by the plaintiff, testified that the absence of a notation in the record of such an examination either means that such an examination was not performed, or constituted a breach of accepted standards of medical practice which require that all findings, both positive and negative, be recorded. Dr. Lichtor is well qualified by study and experience to testify as an expert concerning standards of good medical practice applicable to the medical profession as a whole and to the performance of the surgery in question. He is a senior attending orthopedic surgeon at Menorah Hospital in Kansas City, where he serves on the Pathology, Chart, and Infections Control Committees, and is familiar with the national standards applicable to hospital care. It should be noted at this

7. *Id.*, at 302.

point, however, that Dr. Lichtor is not a specialist in cardio-vascular surgery. He is qualified to testify generally concerning cardio-vascular problems because of his studies of such problems during his general medical and surgical training, and because of his collateral experience with such problems as an orthopedic surgeon. But his testimony on technical issues of vascular surgery is not entitled to the same weight that should be given to the testimony of experienced competent vascular surgeons. It is found that while Dr. Nosti probably did conduct an examination for these signs, his failure to record his observations was a breach of accepted standards of medical practice nationally and in the Kansas City area in 1968.

On October 10, 1968, an arteriogram referred to as a "translumbar aortogram" by the consulting radiologist, Dr. S. T. Ellis, was performed. Radio-opaque dye was injected into plaintiff's aorta, and x-rays were taken as the dye proceeded down the aorta and the arteries in his lower extremities. This diagnostic technique was referred to variously by the expert witnesses who testified at the trial as an "angiogram," "arteriogram," and "aortogram." Because the x-rays of plaintiff included arteries distal to, or below, the aorta, the procedure will hereinafter be referred to as an "arteriogram."

According to Dr. Nosti's testimony, four different x-ray films were taken during the arteriogram. However, only three could be located for introduction as evidence at the time of trial.

Dr. Ellis, the radiologist, concluded in his report from his examination of the x-rays:

> ". . . Examination reveals lower abdominal aorta, common, internal and external iliac arteries, common femoral, deep and superficial femoral arteries to be patent as are the popliteal arteries bilaterally down to a level below the trifurcation on both sides. No block of any of these vessels is evident."[8]

Contrary to Dr. Ellis' conclusion, however, Dr. Nosti read the arteriogram as showing a blockage of the right common iliac artery, at the point where the aorta bifurcates into the right and left common iliac arteries, and a blockage of the left common iliac artery where it bifurcates into the left external and internal iliac arteries.[9] Dr. Daniel P. Cudnik, an intern, and a medical student named Grumman, interpreted the arteriograms as showing a small blockage of the right common iliac artery, but none on the left.[10] Dr. Nosti testified that he could not recall whether he knew of Dr. Ellis', Dr. Cudnik's, and Grumman's interpretations prior to operating on October 17, 1968.

Plaintiff has alleged that the arteriograms taken on October 10, 1968, were not of sufficient quality on which to base a decision to operate. Dr. Crosby, who has specialized in cardiovascular surgery for five years, taught vascular surgery for the past three and one-half years, and read thousands of arteriograms, testified that the arteriograms taken on October 10, 1968, were poor in quality. He further testified that the poor quality may have been caused by inadequate facilities for performing arteriograms at the V.A. Hospital. In March, 1969, Dr. Crosby sent plaintiff to the Kansas University Medical Center for arteriograms because in his opinion, the facilities for arteriograms at the V.A. Hospital were inadequate.

Plaintiff has further alleged that Dr. Nosti was negligent in failing to consult an experienced vascular surgeon

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8. *Id.*, at 294.
9. *Id.*, at 302.
10. *Id.*, at 262-263.

to read the arteriograms in view of the different interpretations of Drs. Nosti, Cudnik, and Ellis. Dr. Crosby testified that adequate arteriograms were crucial in deciding whether to operate. Dr. Nosti, in his fourth year of residency in surgery, had assisted a vascular surgeon at the Kansas University Medical School for three months in a number of vascular operations, including 15 or 20 endarterectomies. He had performed two prior vascular operations under supervision, a carotid endarterectomy and excision of an aneurysm of an artery in the abdominal region. However, he was not an experienced vascular surgeon with mature competence in reading arteriograms. Dr. Lichtor testified that under such circumstances, Dr. Nosti should have sought the opinion of the top staff vascular surgeon at the V.A. Hospital. Although Dr. Crosby and Dr. Henry substantially confirmed Dr. Nosti's interpretation of the V.A. Hospital arteriograms in their testimony, it is found that in view of his inexperience, Dr. Nosti breached accepted medical standards in the Kansas City area in 1968 by failing to seek the opinion of a more experienced vascular surgeon after a conflict over the proper interpretation of the arteriograms arose.

On October 16, 1968, plaintiff's condition was presented to the surgical "Grand Rounds" at the V.A. Hospital, at which cases are discussed by a specialist and staff physician with medical students. The conclusion of the grand rounds, as recorded by Dr. Cudnik, was, in pertinent part:

> "Conclusion was to re-evaluate [patient] in relation to symptoms & determine if symptoms justify surgical intervention."[11]

Plaintiff has alleged that Dr. Nosti was negligent in deciding to remove the obstruction he believed that he saw

11. *Id.*, at 263.

in plaintiff's left common and external iliac arteries, in view of the above conclusion of the surgical grand rounds and the fact that plaintiff had no subjective complaints regarding his left lower extremity.

There is some conflict in the testimony regarding the meaning of the quoted conclusion of the surgical grand rounds. Dr. Henry interpreted the conclusion as meaning that *all physical findings* including x-rays and absence of pulses, should be considered before deciding whether to operate. The more credible interpretation, however, was that of Dr. Lichtor, who testified the grand rounds meant that surgery should only be performed if plaintiff's *subjective complaints* justified it. This interpretation is consistent with Hershey and Calman, *Atlas of Vascular Surgery* (3rd ed. 1973) at 103, [12] nationally recognized as authoritative in the field by all the expert witnesses, which advises that treatment of aortoiliac occlusive disease should be conservative; that surgery should not be performed on patients with minimal disease; and that even claudication is not alone a sufficient indication for major surgery. This interpretation is reasonable in view of Dr. Crosby's testimony that an extremity may cause no subjective complaints, despite absence of pulses and evidence of arterial blockage from an arteriogram, because collateral circulation compensates for the diminished blood flow from the obstructed artery.

Dr. Crosby, Dr. Henry, and Dr. Heilbrun all testified that the diminished left femoral pulse and absence of pulses lower down the left lower extremity justified expansion of the initial operation on plaintiff's right common iliac artery to include the left side despite plaintiff's lack of subjective complaints. This testimony is contrary to

12. Plaintiff's Exhibit No. 39.

the conclusion of the grand rounds and of the *Atlas of Vascular Surgery* which accord primary importance to subjective complaints, and for that reason is not given great weight. It is found that under accepted standards of medical practice nationally and in the Kansas City area in 1968, Dr. Nosti's decision to perform an endarterectomy on the left common and external iliac arteries was not medically justified by the known symptoms, history and current findings.

B. *Consent and Informed Consent.*

Prior to the October 17, 1968, operation, Dr. Nosti discussed with plaintiff the arteriograms and the surgical procedure he recommended. According to plaintiff's testimony, Dr. Nosti pointed out the obstructions on both the right and left side and told plaintiff he would try to remove them. Plaintiff then told Dr. Nosti that his trouble was on his right side; that his left was all right; and not to touch his "left leg." Dr. Nosti did not make any further inquiry after plaintiff made that statement, and did not explain the place or nature of the incision involved in the procedure beyond the general area of the operation. Plaintiff further testified that Dr. Nosti did not inform him of the mortality rate or risk of impairment of sexual ability associated with the proposed and expandable aortoiliac endarterectomy; that the only risk about which he was informed by Dr. Nosti was the risk of loss of a leg; and that Dr. Nosti did not inform him that he had previously performed only two vascular operations as lead surgeon, neither of which was an aortoiliac endarterectomy, or that he would be operating without supervision by a more experienced vascular surgeon. Plaintiff credibly testified that if he had been informed of Dr. Nosti's intention to remove the plaque from the left side, of the risk of impairment of sexual ability, or Dr. Nosti's qualifications, and of the absence of supervision, he would not have consented to the operation proposed by Dr. Nosti.

Plaintiff's wife, who was present when Dr. Nosti showed plaintiff the arteriograms and explained what he intended to do, corroborated plaintiff's testimony that Dr. Nosti did not inform plaintiff he intended to operate on the left lower extremity.

Dr. Nosti recalled that he pointed out the obstructions on both the right and left sides to plaintiff and his wife. He testified that he believed he told plaintiff both should be removed, but could not specifically recall plaintiff's response or that plaintiff said not to touch his left leg, except that he thought plaintiff had agreed. He further stated that it was his general practice to advise patients of the risks of mortality, infection, and sexual impairment associated with the operation; and that he believed he told plaintiff of the mortality risk. However, he had no specific recollection of advising plaintiff of the risk of loss of sexual functions.

Following the discussion which took place, plaintiff signed a consent form which provided in pertinent part:

> "1. I hereby consent to the performance upon myself . . . of *aortic and iliac endarterectomy*—and of such additional operations or procedures as are considered necessary or desirable in the judgment of the medical staff of the [V.A. Hospital].
>
> "2. The nature and purpose of the operation, the risks involved, and the possibility of complications have been explained to me."

The form was also signed by Dr. Nosti.

In spite of Dr. Nosti's testimony and the representations on the consent form to the extent they are to the contrary, it is found that Dr. Nosti failed to inform plaintiff that he intended to operate on his left lower extremity; that there was a risk of sexual impairment associated with an aortoiliac endarterectomy; that he had previously performed under supervision only one endarterectomy in the area; and that he would operate without the supervision of an experienced vascular surgeon. It is further found that plaintiff specifically admonished Dr. Nosti not to touch his left side because he had had no trouble with his left leg. Dr. Nosti's testimony to the contrary is given no weight because of his inability to recollect the crucial conversation.

Finally, it is found that Dr. Nosti did not intentionally operate on plaintiff's left side in disregard of plaintiff's admonition. Rather, he failed to understand plaintiff's admonition as a restriction on the operation to which plaintiff was giving his consent. This failure may have resulted from a language difficulty existing because Dr. Nosti was a native of Argentina who first came to the United States in 1965. Viewed objectively a reasonable physician would realize that plaintiff's references to "left leg" and left side referred to his left lower extremity and hip.

Dr. Nosti's performance of a left common iliac endarterectomy after plaintiff specifically admonished him not to touch his left leg was a violation of accepted standards of medical practice nationally and in the Kansas City area in 1968. Dr. Crosby testified that if a patient told him under similar circumstances not to touch his left leg, he would have explained further why he believed an endarterectomy on the left iliac artery was advisable. If the patient was firm in his restriction, he might have advised him to seek another opinion. Other alternatives

suggested by Dr. Crosby were to refuse to operate under the restriction, or to modify the operative procedure so as to do a bypass. But Dr. Crosby stated that he would not have operated on the left common iliac artery in disregard of the patient's specific admonition. Dr. Henry substantially concurred with Dr. Crosby.

Dr. Nosti's failure to advise plaintiff of the risk of loss of sexual function associated with an aortoiliac endarterectomy was also a breach of accepted standards of medical practice nationally and in the Kansas City area in 1968. Dr. Henry testified that it was common practice in 1968 for vascular surgeons to tell patients of the possibility of sexual impairment. Dr. Crosby testified that it was not good medical practice to fail to inform a patient of this risk. Both agreed that the risk of sexual impairment was 33 per cent or greater. Their testimony was supported by Dr. Lichtor.

Finally, Dr. Nosti's failure to inform plaintiff of his limited experience as a vascular surgeon and of the fact that he would operate without competent supervision was a breach of accepted standards of medical practice in Kansas City in 1968. Dr. Lichtor testified that in view of Dr. Nosti's limited experience, he should have told plaintiff of his medical experience in performing similar operations, and that no staff surgeon would be present assisting or directing the surgery.

C. *Inadequate Supervision of the Operation.*

Plaintiff has alleged that the V.A. Hospital was negligent in failing to provide supervision of the October 17, 1958, operation by a vascular surgeon with mature competence in view of Dr. Nosti's limited prior experience. Defendant contends that the operation was supervised by Dr. Marshall Jacks who was then on the staff of the V.A.

Hospital. However, there is no evidence that Dr. Jacks provided active supervision.

The V.A. Hospital had no written rules requiring any level of operating ability for physicians performing surgery at the V.A. Hospital in 1968.[13] Dr. Nosti's immediate supervisor at the V.A. Hospital was Dr. Marshall Jacks.[14] Dr. Nosti testified that Dr. Jacks gave his approval for the operation. But defendant produced no written evidence of such approval in plaintiff's hospital record or elsewhere. Apparently such written approval was not required by the V.A. Hospital at that time.

Unwritten rules of the V.A. Hospital did not require that a senior physician or staff physician actually be in the operating room when a senior resident performed an operation similar to that performed on plaintiff on October 17, 1968, so long as such a physician was immediately available in the building.[15] The Operation Report made out by Dr. Nosti following the October 17, 1968, operation does not list Dr. Jacks as having been present in the operating room during the operation. Listed as present were Dr. Nosti; Dr. Carr, first assistant; Dr. Cudnik, second assistant; Grumman, the medical student; an anesthetist, Vera Dell; and supporting nurses.[16] Dr. Nosti testified that he did not know whether V.A. Hospital rules required that all persons in the operating room be listed on the operation report, but he believed Dr. Jacks came into the operating room during the operation and supervised the procedure. However, neither Dr. Jacks nor any of those listed as present during the operation, other than Dr. Nosti, were

13. Defendant's "Answers To Interrogatories To Defendant," filed March 3, 1972, Interrogatory No. 8.

14. *Id.*, Interrogatory No. 12.

15. *Id.*, Interrogatory No. 13.

16. Pl. Ex. No. 1, at 302.

produced by defendant as witnesses to testify that Dr. Jacks was present at any time during the operation. Dr. Nosti's uncorroborated testimony is not regarded as a sufficient basis for finding that Dr. Jacks actually did supervise the operation. The greater weight of the evidence is to the contrary.

The failure to provide adequate supervision of the operation by an experienced and competent vascular surgeon was in itself a breach of standards of medical practice nationally and in the Kansas City area in 1968 because of Dr. Nosti's limited experience. Further, even if those standards would not have required such supervision, as Dr. Lichtor testified, plaintiff was entitled to be informed that no such supervision would be provided.

D. *Excessive Dissection.*

In his Operation Report, Dr. Nosti stated that in exposing the aorta prior to performing the endarterectomies, "[t]he dissection was carried up to the duodenum and the small bowel were retracted upwards."[17] Plaintiff alleges, and Dr. Lichtor testified, that carrying the dissection up to the duodenum was unnecessary and excessive and resulted in severance of the presacral nerve and sympathetic nerves which control sexual functions. Dr. Lichtor further testified that even if the presacral nerve was not severed, the excessive dissection coupled with the left common iliac endarterectomy unnecessarily increased the likelihood of sexual impairment.

Dr. Crosby and Dr. Henry, who are more qualified to testify on this issue as experienced vascular surgeons than Dr. Lichtor, disagreed with Dr. Lichtor's conclusion that plaintiff's sexual impairment resulted from excessive dis-

17. *Id.*, at 303.

section. However, they did state that plaintiff's sexual impairment may have been caused by the severing of an invisible sympathetic nerve plexus which surrounds the aorta, particularly on the left, at the point where the aorta bifurcates into the left and right common iliac arteries. Both Dr. Crosby and Dr. Henry also stated that plaintiff's sexual impairment may have resulted naturally from progression of plaintiff's arteriosclerosis by blockage of the arteries supplying the sexual organs with blood, a condition known as Leriche's syndrome. Although plaintiff did report that he had experienced numbness in his penis on one occasion prior to the operation, the sudden change in plaintiff's ability to function sexually following the operation requires a finding that plaintiff's sexual impairment resulted from nerve damage during the first operation. In view of the expert testimony of Dr. Crosby and Dr. Henry on this issue, it cannot be concluded that plaintiff's sexual impairment resulted from excessive dissection up the aorta by Dr. Nosti. Nevertheless, plaintiff was entitled to be informed of the risk of sexual impairment before consenting to the first operation.

E. *Adequacy of Monitoring.*

Testimony by Dr. Lichtor, Dr. Crosby, and Dr. Henry, and the *Atlas of Vascular Surgery,* all agreed that in 1968 it was accepted by vascular surgeons as good medical practice to monitor the pulses in the lower extremities hourly for at least 48 hours following an aortoiliac endarterectomy because the danger of thrombosis from such an operation is greatest during the first 48 hours. Because a thrombus initially forms in a jelly-like state, it is necessary to detect the formation of a thrombus early and to initiate corrective measures promptly if the thrombus is to be removed before causing serious damage. Although Dr. Crosby testified that hourly monitoring was not a minimum standard of care,

it is found that hourly monitoring for the first 48 hours was required by accepted standards of good medical practice nationally and in Kansas City in 1968.

The crucial factual issues with regard to plaintiff's allegation of inadequate monitoring are whether hourly monitoring occurred during the first 48 hours, whether adequate monitoring occurred thereafter, and whether any failure to adequately monitor the pulses in plaintiff's legs caused the disability in plaintiff's left lower extremity.

The Nursing Notes in plaintiff's V.A. Hospital record state that plaintiff was received in the recovery room at 12:15 p.m., on October 17, 1968, and that his pedal pulses were checked that day by nurses at 12:15 p.m.; 1:15 p.m.; and 4:15 p.m.[18] Plaintiff's pedal pulses were checked the same day at 7:15 p.m., by the medical student Grumman who found the right pedal pulse strong, the left pedal pulse weak, and both lower extremities warm and normal in color.[19] Grumman's report was countersigned by Dr. Cudnik. At 11:15 p.m., that day, Dr. Cudnik reported that the dorsalis pedis pulses were present in both legs and approximately equal, and the color was good in both lower extremities.[20]

On October 18 the Nursing Notes reflect that nurses checked plaintiff's pedal pulses only at 12:30 a.m., when a stronger pedal pulse was detected in the right foot. However, nurses noted that plaintiff's lower extremities were warm and had good color at 6:00 a.m., and 9:30 a.m.[21] There is no evidence in the hospital records that

18. *Id.*, at 325.
19. *Id.*, at 266.
20. *Id.*, at 266.
21. *Id.*, at 326.

the pulses in plaintiff's lower extremities were checked by a physician at any time on that day, October 18.

There is nothing in the hospital record to show that plaintiff's pulses were checked at all on October 19. They were next checked according to the records by Grumman once on October 20, and again on October 21, who found both pedal pulses to be strong and on the latter day "[n]o pain in groin or any other indications of thrombosis." Grumman's reports were countersigned by Dr. Carr.[22]

Other than the single note recorded at 12:30 a.m., on October 18, there is no recorded evidence of formation of a thrombus in plaintiff's left lower extremity until October 23 when Grumman and Dr. Carr reported that the pulses on plaintiff's left lower extremity were diminished, that plaintiff's left lower extremity was colder, and that plaintiff ". . . [complained] of discomfort in left leg (outer part of thigh) [when] walking."[23] The latter condition was again reported on October 24,[24] but the claudication on the left side was reported "abated somewhat" by Grumman and Dr. Cudnik on October 30 when plaintiff was discharged.[25]

The medical records thus show that the pulses in plaintiff's left lower extremity were not monitored hourly during the 48 hours following the operation as required by accepted standards of medical practice. The records also show that hourly monitoring was not instituted on either October 18 or October 23 when a diminished left pedal pulse was detected.

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22. *Id.*, at 267.
23. *Id.*, at 267.
24. *Id.*, at 268.
25. *Id.*, at 253-270.

Dr. Lichtor testified that the diminished pedal pulse in plaintiff's left lower extremity detected on October 18 and again on October 23, and plaintiff's subjective complaints concerning his left lower extremity immediately following the operation, show that the thrombosis of plaintiff's left iliac and external arteries began during the first 48 hours after the operation. In Dr. Lichtor's expert opinion, therefore, the failure to monitor hourly during the first 48 hours, and to institute hourly monitoring after a diminished left pedal pulse was detected contributed to and was a proximate cause of the disability of plaintiff's left lower extremity after the operation.

Dr. Crosby and Dr. Henry both testified that the monitoring during the first 48 hours was adequate on the basis of their assumption that monitoring occurred which was not recorded, an assumption which is not justified by the evidence. They further testified that even if hourly monitoring did not occur during the first 48 hours, that failure did not cause plaintiff any injury because the records showed a strong left pedal pulse on October 20 and 21. Finally, they testified that the total occlusion of plaintiff's left common and external iliac arteries must have occurred after plaintiff was discharged from the hospital since plaintiff's pedal pulses were detectable when he was discharged. However, the latter conclusion is controverted by the evidence that there were subjective and objective signs of impairment of plaintiff's left lower extremity prior to plaintiff's discharge from the V.A. Hospital. Further, no adequate monitoring occurred following plaintiff's discharge from the V.A. Hospital.

On the basis of the above evidence, it is found that monitoring during the first 48 hours was inadequate under accepted standards of medical care in the nation and in the Kansas City area in 1968; that the failure to institute

hourly monitoring on October 23 after diminished left pedal pulses and claudication in plaintiff's left lower extremity were discovered was a breach of accepted standards of medical care in the nation and in the Kansas City area in 1968; that the failure to conduct periodic monitoring thereafter was a breach of accepted standards of medical care nationally and in the Kansas City area in 1968; and that the inadequacy of the monitoring significantly contributed to the disability of plaintiff's left lower extremity because the thrombus which totally occluded plaintiff's left common and external iliac arteries began to develop prior to plaintiff's discharge from the V.A. Hospital on October 30, 1968, and further developed following plaintiff's discharge.

F. *Delay in Removal of Thrombus.*

Following plaintiff's discharge, the claudication in his left lower extremity became progressively worse. He was examined again by Grumman and Dr. Nosti on November 20, 1968, who found no pulses in his left lower extremity.[26] He was readmitted to the V.A. Hospital on December 2, 1968. None of the pulses in his left lower extremity were detected at that time.[27] An arteriogram on December 3, 1968, disclosed complete blockage of plaintiff's left common and external iliac arteries.[28] Dr. Nosti then advised surgical removal of the thrombus by insertion of a catheter as described above. Plaintiff consented, and the operation was performed on December 12, 1968. However, it was not successful in relieving the claudication in plaintiff's left lower extremity.

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26. *Id.*, at 16.
27. *Id.*, at 190.
28. *Id.*, at 217.

Dr. Lichtor testified that Dr. Nosti was negligent in writing for over a month and a half to attempt removal of the obstruction, and that earlier removal may have avoided permanent damage to plaintiff's left lower extremity. However, Dr. Henry, who is more qualified than Dr. Lichtor to testify on this issue, testified that the diagnosis and treatment were timely, and that the attempt to remove it was not unreasonably delayed. It is therefore found that Dr. Nosti's delay in performing the embolectomy did not violate accepted standards of medical care in the nation and in the Kansas City area in 1968.

G. *Statute of Limitations.*

Plaintiff filed his administrative tort claim for damages for the personal injuries he suffered as a result of the treatment he received at the V.A. Hospital described above on February 18, 1971. Defendant contends that all claims arising out of acts of malpractice which occurred prior to February 18, 1969, are therefore barred by the two year statute of limitations in Section 2401(b), Title 28, United States Code. The issues of fact to be determined on this question are whether plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the acts of malpractice upon which he bases his claim prior to February 18, 1969. Because discovery of the injury suffered is a prerequisite to discovery of the acts of malpractice which caused the injury, consideration of these issues will be according to the injuries alleged.

(1) *Sexual Impairment.*

Plaintiff first became aware that the October 17, 1968, operation had impaired his ability to function sexually when he attempted, unsuccessfully, to have sexual relations with his wife approximately two weeks following the op-

eration, and once again prior to the December 12, 1968, operation. Plaintiff discussed his sexual impairment with Dr. Nosti sometime prior to his readmission to the V.A. Hospital on December 2, 1968, probably during his examination by Dr. Nosti on November 20.[29] Dr. Nosti told plaintiff he was afraid he might have severed some nerves.[30] However, Dr. Nosti did not further elaborate on that statement to explain that sexual impairment was a risk known to be associated with an aortoiliac endarterectomy, or that the damage was irreparable. Plaintiff testified that he did not understand what Dr. Nosti meant by his statement.

On November 20, 1968, plaintiff filed an application with the Veteran's Administration for an increase in his disability rating in which he stated:

> "Have lost the basic functions of Sexual Intercourse. Am now sterile. Previous Sexual Intercourse average 3 times per week now zero."[31]

As the cause of this disability, plaintiff stated:

> "Had Surgical Intervention for Arterial Blockage with Scar Ranging from Breast Bone to right Femoral Region."[32]

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29. *Id.*, at 16.

30. Although plaintiff testified that this discussion with Dr. Nosti took place *after* the December 12, 1968, operation, Dr. Nosti testified that it occurred *before* the operation. Dr. Nosti's testimony is corroborated by the report of plaintiff's medical history dated December 3, 1968, taken by a medical student, Dodge Engleman, which states in pertinent part:

> "[Patient] also suffered decreased sensation in penis on intercourse, lessened climax, failure to ejaculate, and slight impotence. He was told by Dr. Nosti that some nerves had probably been cut." Pl. Ex. No. 1, at 187.

31. Defendant's Exhibit No. 18.

32. *Id.*

Plaintiff testified that he did not fully understand either the cause or the permanent nature of his sexual impairment until after the March 10, 1969, operation, and that until that time, he assumed that his sexual functions would return. Prior to the March 10, 1969, operation, plaintiff asked Dr. Crosby to determine whether anything could be done to restore his sexual abilities. After the operation, Dr. Crosby informed him that his sexual impairment was caused when sympathetic nerves surrounding his aorta were severed during the October 17, 1968, operation, and that the damage was irreparable.

Defendant contends that by November 20, 1968, plaintiff had either discovered, or was on notice of sufficient facts that he should have discovered, that Dr. Nosti had negligently failed to inform him of the risk of permanent sexual impairment. Defendant contends that Dr. Nosti's statement and plaintiff's application for an increase in his disability rating show that plaintiff knew both the cause and permanent nature of his sexual impairment on that date. However, Dr. Nosti's statement was vague and Dr. Nosti did not clearly explain to plaintiff either the nature or cause of his impairment, and it is therefore given little weight. The application for increased disability benefits reflects only plaintiff's discovery that he had temporarily lost his sexual functions, not that he believed the loss to be permanent or to have resulted from malpractice. Plaintiff's testimony that he was only fully informed of the cause and permanent nature of his impairment after March 10, 1969, is found credible. It was only then that he was on notice of sufficient facts that in the exercise of reasonable diligence he should have discovered that Dr. Nosti had breached his duty to advise him of the risk of permanent sexual impairment before obtaining his consent to the October 17, 1968, operation.

(2) *Disability of Plaintiff's Left Leg.*

Plaintiff first discovered that his left lower extremity had been adversely affected by the October 17, 1968, operation when he awoke from the anesthesia and discovered that his left lower extremity was numb and cold. Soon thereafter, plaintiff said to Dr. Nosti: "I don't know what you have done [to my left leg]. Why did you go in there when I told you not to." However, Dr. Nosti did not then inform plaintiff, nor had he previously informed plaintiff, that he had performed an endarterectomy on plaintiff's left common iliac artery.

Plaintiff first discovered that Dr. Nosti had made a separate incision in his left common iliac artery in January, 1971. He had retained counsel in December, 1970 to determine whether the recently aggravated condition of his left lower extremity was the result of any malpractice during his treatment at the V.A. Hospital. His counsel discovered from the Operation Report in plaintiff's hospital record that a second incision had been made. Only after this discovery did plaintiff, through his counsel, investigate the possibility of other acts of malpractice which may have occurred.

Until plaintiff discovered that an incision had been made in his left common iliac artery, in disregard of his admonition not to touch his left leg, he was not on notice of facts sufficient to alert him that the disability of his left lower extremity was anything other than a normal complication of the endarterectomy performed on plaintiff's right common iliac artery. Even if plaintiff showed a lack of diligence in waiting until December, 1970 to initiate an investigation into possible acts of malpractice, it would have been unreasonable for him to initiate an investigation prior to April 15, 1969, when his continuing treatment at the V.A. Hospital ended and the permanence

of the injury to his left lower extremity became apparent to him.

II. *Conclusions of Law on Issue of Liability.*

A. *Statute of Limitations.*

Section 2401(b), Title 28, United States Code, provides in pertinent part:

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . ."

When a claim "accrues" is a matter of federal law. *Reilly* v. *United States,* 513 F.2d 147 (8th Cir. 1975); *Jordan* v. *United States,* 503 F.2d 620 (6th Cir. 1974); *Portis* v. *United States,* 483 F.2d 673 (4th Cir. 1973); *Ciccarone* v. *United States,* 486 F.2d 253 (3rd Cir. 1973).[33] While some jurisdictions provide that the limitation period, within which a plaintiff with a negligence claim may bring his action, commences to run with the occurrence of the act or omission giving rise to the claim, the federal courts have held that in medical malpractice actions against the United States the limitation period does not begin to run until ". . . the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice upon which the cause of action is based." *Reilly* v. *United States, supra,* at 148; *Jordan* v. *United States, supra*; *Ciccarone* v. *United States, supra*; *Portis* v. *United States, supra.*

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33. *Accord: Tyminiski* v. *United States,* 481 F.2d 257 (3rd Cir. 1973); *Kington* v. *United States,* 396 F.2d 9 (6th Cir. 1968); *Toal* v. *United States,* 438 F.2d 222 (2nd Cir. 1971); *Hungerford* v. *United States,* 307 F.2d 99 (9th Cir. 1962); *Quinton* v. *United States,* 304 F.2d 234 (5th Cir. 1962). *But see: Tessier* v. *United States,* 269 F.2d 305 (1st Cir. 1959).

In this case, as factually concluded, plaintiff did not discover the alleged acts of malpractice which he contends caused his sexual impairment and the impairment of the functions of his left lower extremity until after February 18, 1969. Further, as factually concluded, plaintiff did not fail to exercise reasonable diligence in not discovering the alleged acts of malpractice prior to February 18, 1969. It was only after that date that his condition became so grave that a reasonable person would have been alerted to the possibility of lack of informed consent and negligence in the treatment received. It is therefore legally concluded that none of the acts of malpractice alleged by plaintiff are barred by the two year statute of limitations in Section 2401(b), Title 28, United States Code.

B. *"Assault and Battery" Exclusion.*

Section 2680(h), Title 28, United States Code, provides:

> "The provisions of [the Federal Tort Claims Act] and section 1346(b) of this title shall not apply to —
>
> * * *
>
> "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Defendant contends that plaintiff's claim that Dr. Nosti operated on his left common iliac artery in disregard of his admonition not to touch his "left leg" or "left side" falls within, and is excluded from the Federal Tort Claims Act by, Section 2680(h).

The applicability of the "assault and battery" exclusion to similar claims was fully discussed in *Hulver* v. *United States*, 393 F.Supp. 749 (W.D.Mo. 1975). Therein, it was

concluded that the "assault and battery" exclusion would only bar plaintiff's claim if there was

> ". . . conclusive proof that the operation was *intentionally* performed in those areas *specifically excluded* by the plaintiff. Instead, the finder of facts may find that the act complained of was negligently done as a result of unintentional lack of care. . . . If such evidence is submitted to the finder of facts, the plaintiff could recover for negligent malpractice under the Federal Tort Claims Act." (citations omitted) [emphasis in original] at 753

See also: *Lane* v. *United States*, 225 F.Supp. 850 (E.D.Va. 1964). *Cf.*: *Moos* v. *United States*, 225 F.2d 705 (8th Cir. 1955); *Fontenelle* v. *United States*, 327 F.Supp. 801 (S.D.N.Y. 1971).

The evidence in this case does not support a finding that Dr. Nosti intentionally performed a left common iliac endarterectomy in direct disregard of what he understood to be a direction by plaintiff not to operate on his left leg. Rather, the preponderance of the evidence is that Dr. Nosti negligently failed to understand that plaintiff intended his admonition not to touch his "left leg" or "left side" to be a restriction on the scope of the operation to which plaintiff was consenting; and, he negligently failed thereafter to explore the meaning of plaintiff's admonition by fully explaining to plaintiff the scope of the operation which he intended to perform. Because proof of the requisite element of intent is absent in this case, it is concluded that plaintiff's claim that Dr. Nosti performed a left common ilias endarterectomy in disregard of his adminition not to touch his left leg is not a battery and is not excluded from the Federal Tort Claims Act by Section 2680(h), Title 28, United States Code.

C. *Merits.*

Section 2674, Title 28, United States Code, provides in pertinent part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

This provision makes the substantive law of the state in which the tort occurred the standard of conduct by which the Government's liability must be assessed. *Donham* v. *United States,* ____ F.2d ____, No. 75-1516 (8th Cir. June 4, 1976); *Bacon* v. *United States,* 321 F.2d 880 (8th Cir. 1963); *Johnson* v. *United States,* 271 F.Supp. 205 (D.C.Ark. 1967).

Missouri follows the universal rule that a physician or surgeon must possess and exercise that degree of skill, care, and proficiency ordinarily possessed and exercised by the ordinary skillful, careful, and prudent physician or surgeon engaged in a similar practice in a similar locality under similar circumstances. *Silberstein* v. *Berwald,* 460 S.W.2d 707 (Mo. 1970); *Haase* v. *Garfinkel,* 418 S.W.2d 108 (Mo. 1967); *Hart* v. *Steele,* 416 S.W.2d 927 (Mo. 1967). *See*: *Brown* v. *United States,* 419 F.2d 337 (8th Cir. 1969). Missouri also recognizes the doctrine of "informed consent" which requires that, in the absence of exceptional circumstances, a physician owes a patient in possession of his faculties the duty to inform him generally of the possible serious collateral risks associated with a recommended course of treatment. *Aiken* v. *Clary,* 396 S.W.2d 668 (Mo. 1965); *Mitchell* v. *Robinson,* 334 S.W.2d 11 (Mo. 1960). *See*: *Karchmer,* "Informed Consent: A Plaintiff's Medical Malpractice 'Wonder Drug' ", 31 Mo.L.Rev. 29 (1966). Expert testimony is required to establish both a failure

to exercise the requisite degree of skill, care, and proficiency and a failure to comply with the requirements of the "informed consent" doctrine. *Aiken* v. *Clary, supra.*

The evidence and expert testimony adduced proves by a preponderance of the evidence that the treatment received by plaintiff at the V.A. Hospital fell below the prevailing standards of medical care in the Kansas City area in 1968 (and in the nation as well) in several respects.

First, Dr. Nosti's decision to perform a left common iliac endarterectomy was made on the basis of inadequate arteriograms and without an evaluation of plaintiff's condition by an experienced vascular surgeon. Further, the decision was not medically warranted in view of the absence of any subjective complaints by plaintiff regarding his left lower extremity, as noted in the grand rounds.

Second, the left common iliac endarterectomy was performed without plaintiff's informed consent in that Dr. Nosti negligently disregarded plaintiff's admonition not to touch his "left leg" or "left side" which a reasonable surgeon would have realized was intended by plaintiff as a restriction on the scope of the operation to which he was consenting.

Third, Dr. Nosti failed to obtain plaintiff's informed consent for the operation by failing to advise him of the risk of loss of sexual functions, which was known to be associated with an aortoiliac endarterectomy, and about which vascular surgeons commonly informed patients who were candidates for such an operation, and by failing to advise plaintiff of his limited experience as a vascular surgeon.

Fourth, Dr. Nosti performed the October 17, 1968, operation without adequate supervision by an experienced vascular surgeon.

Fifth, the preponderance of the evidence shows that there was inadequate monitoring of the pulses in plaintiff's lower extremities following the October 17, 1968, operation, and that this negligence significantly contributed to the disability of plaintiff's left lower extremity.

Dr. Nosti's negligence in each of these respects directly and proximately caused plaintiff's sexual impairment and the disability of his left lower extremity.

The issue of liability is therefore determined in favor of plaintiff.

III. *Damages.*

Plaintiff claims that as a result of the acts of negligence set forth above, he has suffered general damages, including past, future, and permanent impairment of his sexual functions and his left lower extremity, and pain, suffering, humiliation and mental anguish which includes but is not limited to his loss of medical certification as a pilot; and special damages, including medical and related expenses, and past and future loss of earnings. Plaintiff seeks damages in the sum of $750,000.00, and his costs in this action.

After consideration of the factual and legal contentions of the parties and the evidence presented, the following findings of fact and conclusions of law regarding plaintiff's claims for general and special damages are made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. *Hysell* v. *Iowa Public Service Company,* ..... F.2d ....., No. 75-1414 (8th Cir. April 12, 1976).

A. *General Damages.*

Plaintiff has proven by a preponderance of the evidence that his ability to function sexually was substantially

permanently destroyed by the negligence in performing the October 17, 1968, operation, and that he has been unable successfully to have sexual relations with his wife since that time, and has and will continue to be sexually impotent and suffer mental anguish as a result thereof. Plaintiff further proved by a preponderance of the evidence that as a proximate result of the negligence described above, he suffered a functional impairment of his left lower extremity soon after the October 17, 1968, operation, which improved somewhat following the March 10, 1969, operation, but which later deteriorated in August, 1970, has continued to the present, and will continue permanently, to prevent him from pursuing gainful employment and to impair his ability to walk; that he suffered and will continue to suffer pain and mental anguish as a proximate result thereof.

Plaintiff has proven by a preponderance of the evidence that he lost his medical certification as an aircraft pilot in December, 1969, and that since that time he has been unable to fly. Plaintiff had previously derived substantial enjoyment from flying as an avocation.

It is therefore concluded that plaintiff is entitled to an award of general damages in the amount of $125,000.00.

B. *Special Damages in the Total Amount of $77,-298.12.*

Plaintiff has proven by a preponderance of the evidence that he has incurred medical and related expenses in the amount of $13,053.12 as a direct result of the negligence of the defendant proven in this action. No future medical expenses, unrelated to preexisting injuries and conditions, were proven in an amount that can be relied upon under existing standards of proof.

He has further proven by a preponderance of the evidence that he has suffered resulting past and future loss of earnings in a total amount of $64,245.00. This amount includes a limited assumption of inflation and a finding that plaintiff will become unemployable at age 65. It also takes into account that plaintiff had some preexisting impairment and disability from wounds suffered in World War II and cardiovascular trouble.

It is therefore concluded that plaintiff is entitled to an award of special damages in the amount of $77,298.12.[34]

Under the provisions of Section 2678, Title 28, United States Code,

> "No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title."

Pursuant to the foregoing provision, it is determined that plaintiff's counsel is entitled to an attorney's fee in the amount of twenty-five percent of the judgment herein recovered by plaintiff in accordance with the contingent fee agreement between plaintiff and his counsel.

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that the issue of liability be, and it is hereby, determined in favor of plaintiff. It is further

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34. Prejudgment interest is not allowable under Section 2674, Title 28, United States Code.

ORDERED and ADJUDGED that plaintiff, Isaac Newton Hulver, have and recover of and from defendant, United States of America, general damages in the amount of $125,000.00, and special damages in the amount of $77,298.12, for a total sum of $202,298.12 plus interest thereon according to law from June 24, 1976, and his costs herein incurred and expended. It is further

ORDERED and ADJUDGED that plaintiff's counsel be, and he is hereby, awarded an attorney's fee in the amount of $50,574.53 to be paid out of the judgment herein recovered by plaintiff.

/s/ William H. Becker
William H. Becker
Chief Judge

Kansas City, Missouri

Date: 8-9-76

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
for the Western District of Missouri
Western Division

Civil Action No. 19917-3

ISAAC NEWTON HULVER,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

FINAL JUDGMENT ON ISSUE OF LIABILITY AND DAMAGES

(Filed June 24, 1976)

An interlocutory order announcing a determination in favor of the plaintiff on the issue of liability has been entered. In order to expedite the final determination of the issue of liability and damages, the findings and conclusions on the issue of liability will be briefly summarized.

First, on the statute of limitations issue, plaintiff proved by a preponderance of the evidence that he did not discover the alleged acts of malpractice which he contends caused his sexual impairment and the impairment of the functions of his left lower extremity until after February 18, 1969; and that he did not fail to exercise reasonable diligence in not discovering the alleged acts of malpractice prior to that date. Therefore, none of the acts of malpractice alleged by plaintiff are barred by the

two year statute of limitations in Section 2401(b), Title 28, United States Code.

Second, on the negligence issues, plaintiff proved by a preponderance of the evidence that Dr. Nosti, an employee of the V.A. Hospital, was negligent in deciding to perform a left common iliac endarterectomy on the basis of inadequate arteriograms, without an evaluation of plaintiff's condition by an experienced vascular surgeon, and without any symptoms or subjective complaints by plaintiff regarding his left lower extremity; in negligently disregarding plaintiff's admonition not to touch his "left leg" (obviously meaning his left lower extremity) which a reasonable surgeon would have realized was intended by plaintiff as a restriction on the scope of the operation to which he was consenting; in failing to obtain plaintiff's informed consent for the operation by failing to advise plaintiff of the risks of the intended operation including risk of loss of sexual functions known to be associated with an aortoiliac endarterectomy; and in performing the October 17, 1968, operation without adequate supervision by an experienced staff vascular surgeon. Each of these acts of malpractice constituted negligence and was a proximate cause of the impairment of plaintiff's sexual functions and impairment of plaintiff's left lower extremity.

Further plaintiff proved that the staff of the V. A. Hospital negligently failed to monitor the plaintiff's condition reasonably frequently and long after the initial operation, and negligently failed to provide customary supervision of the initial surgery by a staff surgeon or physician. Each of these negligent acts was a proximate cause of the impairment of the function of plaintiff's left extremity.

Third, plaintiff's claim that Dr. Nosti performed a left common iliac endarterectomy despite his admonition not to touch his left leg is not barred by the "assault and battery"

exclusion of the Federal Tort Claims Act, Section 2680(h), Title 28, United States Code. The evidence does not support a finding that Dr. Nosti intentionally disregarded what he fully understood was a direction by plaintiff not to perform a left iliac endarterectomy. (There was a language difficulty involved.) Rather, the preponderance of the evidence shows that Dr. Nosti negligently failed to understand that plaintiff's admonition not to touch his left leg was a restriction on the scope of the operation to which plaintiff was consenting. Dr. Nosti negligently failed thereafter to fully explore what plaintiff meant by his statement. Therefore, assuming that the "assault and battery" exclusion applies to medical malpractice claims, proof of the requisite assaultive intent to perform an operation in an area specifically excluded by the patient is absent in this case.

Plaintiff claims that as a result of the acts of negligence set forth above, he has suffered general damages, including past, future, and permanent impairment of his sexual functions and his left lower extremity, and pain, suffering, humiliation and mental anguish which includes but is not limited to his loss of medical certification as a pilot; and special damages, including medical and related expenses, and past and future loss of earnings. Plaintiff seeks damages in the sum of $750,000.00, and his costs in this action.

On June 23, 1976, a plenary evidentiary hearing without a jury was held on the issue of damages. After consideration of the factual and legal contentions of the parties and the evidence presented, the following additional findings of fact and conclusions of law regarding plaintiff's claims for general and special damages are made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. *Hysell* v. *Iowa Public Service Company,* ..... F.2d ....., No. 75-1414 (8th Cir. April 12, 1976).

A. *General Damages.*

Plaintiff has proven by a preponderance of the evidence that his ability to function sexually was substantially permanently destroyed by the negligence in performing the October 17, 1968, operation, and that he has been unable to successfully have sexual relations with his wife since that time, and has and will continue to be sexually impotent and suffer mental anguish as a result of the negligence of Dr. Nosti. Plaintiff further proved by a preponderance of the evidence that as a proximate result of the negligence described above, he suffered a functional impairment of his left lower extremity soon after the October 17, 1968, operation, which improved somewhat following the March 10, 1969, operation, but which later deteriorated in August, 1970, has continued to the present, and will continue permanently, to prevent him from pursuing gainful employment and to impair his ability to walk; that he suffered and will continue to suffer pain and mental anguish as a proximate result of defendant's negligence.

Plaintiff has proven by a preponderance of the evidence that he lost his medical certification as an aircraft pilot in December, 1969, and that since that time he has been unable to fly. Plaintiff had previously derived substantial enjoyment from flying as an avocation. Plaintiff has further shown that he has suffered intense personal humiliation from the loss of his sexual potency; and substantial pain and mental anguish from the functional impairment of his left lower extremity.

It is therefore concluded that plaintiff is entitled to an award of general damages in the amount of $125,000.00.

B. *Special Damages in the Total Amount of $77,298.12.*

Plaintiff has proven by a preponderance of the evidence that he has incurred medical and related expenses in the amount of $13,053.12 as a direct result of the negligence of the defendant sustained from the acts of malpractice proven in this action. No future medical expenses, unrelated to preexisting injuries and conditions, were proven in an amount that can be relied upon under existing standards of proof.

He has further proven by a preponderance of the evidence that he has suffered resulting past and future loss of earnings in a total amount of $64,245.00. This amount includes an assumption of inflation and a finding that plaintiff will become unemployable at age 65. It also takes into account that plaintiff had some preexisting impairment and disability from wounds suffered in World War II and cardiovascular trouble.

It is therefore concluded that plaintiff is entitled to an award of special damages in the amount of $77,298.12.[1]

Under the provisions of Section 2678, Title 28, United States Code,

> "No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title."

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1. Prejudgment interest is not allowable under Section 2674, Title 28, United States Code.

Pursuant to the foregoing provision, it is determined that plaintiff's counsel is entitled to an attorney's fee in the amount of twenty-five percent of the judgment herein recovered by plaintiff.

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that plaintiff, Isaac Newton Hulver, have and recover of and from defendant, United States of America, general damages in the amount of $125,000.00, and special damages in the amount of $77,298.12, for a total sum of $202,298.12 plus interest thereon according to law from June 24, 1976, and his costs herein incurred and expended. It is further

ORDERED and ADJUDGED that plaintiff's counsel be, and he is hereby, awarded an attorney's fee in the amount of $50,574.53 to be paid out of the judgment herein recovered by plaintiff.

/s/ William H. Becker
William H. Becker
Chief Judge

Kansas City, Missouri

Date: 6-24-76

APPENDIX D

Isaac Newton HULVER, Plaintiff,

v.

UNITED STATES of America,
Defendant.

Civ. A. No. 19917-3.

United States District Court,
W. D. Missouri, W. D.

April 10, 1975.

William H. Pickett, Kansas City, Mo., for plaintiff.

Robert G. Ulrich, Asst. U. S. Atty., Kansas City, Mo., for defendant.

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

WILLIAM H. BECKER, Chief Judge.

This is a civil action for damages for personal injury resulting from alleged acts of medical malpractice by government employees acting within the scope of their employment. Original jurisdiction exists under § 1346(b), Title 28, U.S.C., and the Federal Tort Claims Act § 2671 et seq. Title 28, U.S.C.

The defendant has moved for a partial summary judgment. Viewed in the light most favorable to the plaintiff the material facts are as follows:

Plaintiff underwent surgery on three separate occasions at the Kansas City Missouri Veteran's Administration

Hospital within a six-month period of time. Basically, the operations were performed to improve the circulation in the plaintiff's right and left legs. The first operation was performed on October 17, 1968. Plaintiff contends that this operation was performed without his informed consent and in the area of the left iliac artery that he had specifically admonished the government surgeon not to touch. The second operation was performed on December 12, 1968. With respect to this second operation, plaintiff alleges that government surgeons were negligent in improperly attempting to remove a thrombus from his left iliac artery. The third operation was performed on March 10, 1969. Plaintiff alleges that this third operation was performed solely as an attempt to correct the damage and injury resulting from the first and second operations. As a direct and proximate result of the alleged wrongful acts or omissions of the defendant, plaintiff claims to have suffered the following injuries:

1. loss of sexual potency;
2. loss of his sexual response;
3. crippling effect to his left leg;
4. severe arterial circulatory loss and internal damage to his body;
5. forced termination of employment;
6. loss of medical certification as an aircraft pilot;
7. future loss of earnings; and
8. pain, suffering, mental anguish and humiliation.

On February 22, 1971, the plaintiff filed an administrative tort claim with the Veteran's Administration. This claim was denied by letter dated August 17, 1971. Thereafter, the complaint was filed herein on December 3, 1971.

At the close of discovery and after the filing of Standard Pretrial Order No. 2, the defendant filed a motion for partial summary judgment, "pursuant to Rule 56, F.R.Civ.P.," moving for dismissal of the claims in paragraphs 6, 7, 8, 9, 10, and 11 of the plaintiff's complaint. Defendant bases its motion for partial summary judgment on the following two independent grounds:

1. The plaintiff's claims arising out of the alleged negligent acts or omissions in connection with the first operation of October 17, 1968, are excluded from coverage under the Federal Tort Claims Act by virtue of Title 28, U.S.C., § 2680(h) which excludes, among others, any claims arising out of an assault and battery.

2. The plaintiff's claims arising out of the alleged negligent or wrongful acts or omissions of the government occurring on to before February 22, 1969, are barred by the statute of limitations, Title 28, U.S.C., § 2401(b).

[1, 2] In this action, defendant's motion for a partial summary judgment also performs the functions of a motion to dismiss or a motion for judgment on the pleadings. 6 Moore, Federal Practice, 2035 (1974 Edition). Treated as a motion to dismiss under Rule 12(b), F.R.Civ.P., as a motion for judgment on the pleadings, or as a motion for partial summary judgment under Rule 56, F.R.Civ.P., the defendant fails to demonstrate that the complaint and other information in the record, construed in the light most favorable to the plaintiff, have failed to establish a claim upon which relief can be granted. Neither a complaint nor any portions thereof should be dismissed for alleged insufficiency of statement of facts unless it appears to a *certainty* that the plaintiff would not be entitled to

any relief under *any* facts which could be proved in support of the complaint. Leimer v. State Mutual Life Assur. Co., 108 F.2d 302 (8th Cir. 1940). Defendant apparently misapprehends the function of the Federal Rules of Civil Procedure in determining the sufficiency of pleadings. From the time of adoption of these rules, the federal courts have rejected the theory of the case doctrine and the approach that pleading is a game of skill in which one mistake by counsel may be decisive of the outcome of the action. Instead, the salutary purpose of pleading is to facilitate a proper decision based on the merits. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In its motion the defendant has failed to demonstrate the lack of litigable factual issues in this cause. Under the factual circumstances disclosed by the record in this action, it is conceivable that the plaintiff can prove a tort based on negligence or some other breach of duty by government employees acting within the scope of their employment, which does not constitute an assault or battery within the exclusion of § 2680(h) of the Federal Torts Claim Act.

Further, the motion for partial summary judgment should be denied because the defendant has failed to establish that there is no litigable issue of material fact.

[3, 4] A summary judgment is an extreme remedy. It should be entered only when the moving party is entitled to it beyond all doubt. A party opposing a motion for summary judgment is equally entitled to the benefit of *all* favorable inferences that may reasonably be drawn from the record. Minnesota Bearing Company v. White Motor Corporation, 470 F.2d 1323 (8th Cir. 1973); Traylor v. Black, Sivalls & Bryson, 189 F.2d 213 (8th Cir. 1943).

Defendant contends that the alleged conduct of the government's surgeons in the operation performed on the

plaintiff on October 17, 1968, constituted a battery, "within the classic definition" of that word. In support of that contention, defendant states:

> "The plaintiff herein is alleging that he admonished Dr. Nosti not to touch any portion of the arterial system which fed his left leg, but that in spite of the specific admonition, Dr. Nosti did so anyway. (Plaintiff's Answer No. 1(b) to Defendant's Second Set of Interrogatories; Plaintiff's Answer No. 6 to Defendant's Interrogatory No. 6; Plaintiff's deposition page 12, lines 6 and 7.) There is no dispute that the operation was performed, nor does the defendant claim that the operation included the area of bifurcation of the left external and left internal iliac arteries *by mistake*. Memorandum In Support of Government's Motion For Partial Summary Judgment, October 18, 1972 at page 4. (Emphasis added.)

[5] In order to have committed a battery, the defendant must have done some positive or affirmative act and that act must not only have caused *but must have been intended to cause* an unpermitted contact. Prosser, Law of Torts at p. 34 (3rd Ed. 1964).

The element of intent is of special importance in this action. Section 16, Volume I, Restatement (Second) of Torts (1965), deals directly with the character of intent necessary to constitute a battery. It reads in part:

> "§ 16. (1) If an act is done *with the intention of inflicting upon another an offensive but not harmful bodily contact,* or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm." (Emphasis added.)

The factual basis necessary to establish conclusively such a lack of intent is not present in the record of this action. For example, the deposition of Dr. Juan Carlos Nosti, the government surgeon who operated on the plaintiff in October of 1968, reveals a total lack of intent, hostile or otherwise, to commit a battery. In response to questioning by counsel for the plaintiff, Dr. Nosti stated that he could not recall any admonition by the defendant not to operate on his left leg. Relevant portions of Dr. Nosti's deposition on this point read as follows:

> "* * *
>
> Q. You don't remember any conversation—
>
> A. No, I don't remember.
>
> Q. —where he told you not to touch the left leg?
>
> A. No.
>
> * * *
>
> A. . . . so if a patient tells me, 'I don't want you to touch that spot—particular spot, because my leg is alright,' I would say this is what should be done, and this is not, you know, the normal procedure. . . . And you advise the patient what he should have done, and if the patient refuses that type of care—if it's an elective procedure like this was, he wasn't in any danger of death or anything, so if that is the case—if he refuses to have the operation done, unless they were under his terms, then you just can't do it.
>
> Q. Or do it under your terms—or do it under your terms, is the other choice.
>
> A. Not without the consent of the patient. That wouldn't—I don't think anybody would do that, just go ahead and do something if the patient had told you ahead of time, 'Don't touch that spot,' you know,

you would never say 'Oh, who cares what he says' and go ahead and operate." Deposition of Dr. Juan Carlos Nosti, May 12, 1972, at pages 72, 74.

[6] Assuming that the defendant may have grounds to state accurately that the operation on the left iliac arteries was not performed "by mistake," Dr. Nosti's answers fall far short of conclusive proof that the operation was *intentionally* performed in those areas *specifically excluded* by the plaintiff. Instead, the finder of facts may find that the act complained of was negligently done as a result of unintentional actionable lack of care. In the absence of the requisite element of intent, the evidence viewed in the light most favorable to the plaintiff may result in a submissible case of negligence of one or more of the employees of the United States. If such evidence is submitted to the finder of facts, the plaintiff could recover for negligent malpractice under the Federal Tort Claims Act. United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Schwartz v. United States, 230 F.Supp. 536 (D.C. Pa.1964).

Defendant places great emphasis on the holding in Moos v. United States, 225 F.2d 705 (8th Cir. 1955), in support of its motion. In the *Moos* case, the plaintiff entered a veteran's hospital for the treatment of a service-connected injury of his left leg and hip. He consented to an operation on that area of his body. While the plaintiff was unconscious and under an anesthetic, a government surgeon, without the plaintiff's knowledge or consent, performed an "unnecessary and uncalled for operation" on the plaintiff's *right hip and knee*. The district court and appellate court held that the plaintiff's claim was barred on the sound technical theory that the unconsented to operation on the *right* leg and hip constituted a battery. The peculiar facts of the Moos case are explained in Jayson, Volume 2 Handling Federal Tort Claims (1974) in a footnote on page 13-21 therein:

> "[5] One would expect that today the Justice Department would be inclined to view a claim such as this as based on *negligent malpractice*. Actually, when this case was being litigated, the Department's principal defense was that the claimant was a veteran, that as a result of the wrongful operation he became entitled to additional compensation under the veteran's benefits law; and that such compensation constituted the exclusive remedy against the United States. The Supreme Court, in United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954) . . . subsequently rejected the Department's contention." (Emphasis added.)

The author Jayson appeared as counsel for the Department of Justice in the *Moos* case.

The facts in this action may be distinguished from the decision in *Moos* on other grounds. In this action the government surgeon has, in his testimony, expressly denied any intent or desire to operate on any area specifically excluded by the plaintiff. No such permissible inference appeared in the record of the *Moos* case. It is entirely conceivable that the finder of facts may discover a case of negligent malpractice.

In this area of law surprisingly undeveloped by judicial decision, one court has gone so far as to examine and disregard the *Moos* decision as "incorrectly decided." See Lane v. United States, 25 F.Supp. 850 (E.D.Va.1964), in which the court was faced with the identical factual issues present in the *Moos* case. An operation planned for the plaintiff's left knee was performed on his right.

Following a discussion of the "technical" nature of the battery, the court concluded:

> "The ultimate interpretation must rest with the United States Court of Appeals for the Fourth Circuit or the United States Supreme Court. While reluctant to disagree with the Eighth Circuit this Court cannot believe that Congress ever intended to apply the exclusion to the factual situation here presented." (Lane v. United States, *supra*, at p. 853)

[7] It is not necessary to reach the conclusion in the *Lane* case that the *Moos* case was incorrectly decided. In the case at bar, there has been no conclusive showing by the defendant that a battery even occurred. The unresolved litigable material issue remaining in this action is whether the government surgeon intentionally operated on a specifically excluded area of the plaintiff. This factual issue can be resolved only by trial. Therefore, the defendant's motion to dismiss those paragraphs of the complaint purportedly constituting a tort of battery will be denied.

The defendant's second independent ground in support of its motion for partial summary judgment is equally lacking in merit. The defendant contends that the statute of limitations in tort claims against the United States effectively bars any claims arising out of alleged negligent or wrongful acts or omissions of the government occurring on or before February 22, 1969. (Plaintiff's administrative tort claim was filed on February 22, 1971.) In the factual circumstances presently inferable from the record in this action, entry of partial summary judgment would have the effect of barring those alleged claims of malpractice arising out of the operations of October 17, 1968, and December 12, 1968. Defendant's contention that this re-

sult is required under § 2401(b), Title 28, U.S.C., is unfounded. That statute reads:

> "(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim *accrues* or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." (Emphasis added.)

[8, 9] It is well-settled that the period of limitations does not begin to run until the alleged acts or omissions of the defendant's employees are *discovered,* or in the exercise of reasonable diligence, should have been discovered by the plaintiff. This equitable doctrine applies to all federal statutes of limitation, including § 2401(b). *Cf.* Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); 7 A.L.R.3rd 732; 2 Jayson, Handling Federal Tort Claims, § 277.01-277.02.

[10] In this action, the defendant has failed to establish the nonexistence of any litigable issue because of application of the statute of limitations. There has been no conclusive showing that plaintiff knew or should have known of the alleged malpractice on or before February 18, 1969. The plaintiff may well prove that he was not aware that he had been injured through alleged negligent medical treatment until February of 1971.

Further, the plaintiff may produce proof of other circumstances that would preclude the running of the statute of limitations in this action. For example, it may be proved that the series of operations constitute a continu-

ing tort in respect to which the statute does not run until the last negligent act is completed.[1] See 2 Jayson, supra, § 277.04.

Therefore, treated as a motion for partial summary judgment, as a motion to dismiss, and also as a motion for judgment on the pleadings, it is hereby

Ordered that defendant's motion pursuant to Rule 56, F.R.Civ.P., be, and it is hereby, denied.

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1. On the subject of continuing torts and the continuous treatment rule, see Reilly v. United States, 513 F.2d 147 (8 C.A. 1975).